Petition

81-1893

Supreme Court, U.S.
FILED
APR 13 1982
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

GEORGE DEUKMEJIAN,
Attorney General
ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General
Criminal Division
DANIEL J. KREMER,
Assistant Attorney General
A. WELLS PETERSEN,
Deputy Attorney General
HARLEY D. MAYFIELD,
Deputy Attorney General

110 West "A" Street, Suite 700
San Diego, California 92101
Telephone: (714) 237-7759

Attorneys for Petitioner

QUESTION PRESENTED

Whether enforcement of that portion of a validly enacted statute which requires that the jury in a capital case be instructed at the penalty phase that the prescribed alternate punishment of life imprisonment without the possibility of parole may in the future be commuted or modified to include the possibility of parole is prohibited by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution; particularly where the validly enacted statute also prescribes specific guidelines for the jury and requires it to find that aggravating circumstances outweigh mitigating circumstances as a prerequisite to imposition of the death penalty.

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PETITION FOR WRIT OF CERTIORARI IN THE CALIFORNIA SUPREME COURT

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California affirming the conviction but reversing the penalty of death, entered on January 25, 1982, with one of

the seven justices voting to affirm the death penalty. A petition for rehearing was denied on February 24, 1982, and the opinion was ordered modified. The remittitur was issued on February 25, 1982.

OPINIONS BELOW

The opinion of the California Supreme Court affirming the judgment of guilt but reversing the penalty of death (People v. Ramos (1982) 30 Cal.3d 553, ___ Cal.Rptr. ___) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for rehearing without opinion appears as Appendix B, and an order modifying the opinion appears as Appendix C of this petition.

JURISDICTION

The judgment of the California Supreme Court was filed on January 25, 1982. A timely petition for rehearing was denied on February 24, 1980. This petition is filed within 60 days of that date and therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendments Five, Eight and Fourteen.

2. California Constitution, Article V, section 8.

3. California Penal Code, sections 190, 190.3 and 4801.

4. California Administrative Code, Title 15, section 2817.

The text of each of the above provisions is set forth in Appendix D to this petition.

STATEMENT OF THE CASE

In a four-count information filed by the District Attorney of Orange County respondent and a co-defendant, Ruben Gaitan, were accused of the robbery and murder of Kathryn Parrott and the robbery and attempted murder of Kevin Pickrell. It was further alleged that respondent had used a firearm in the commission of each of the offenses, that he intentionally inflicted great bodily injury on Kevin Pickrell and that the murder of Kathryn Parrott was committed while respondent was engaged in the commission and attempted commission and immediate flight after committing robbery. Additional allegations of murder for financial gain and specially heinous murder were stricken before trial.

(CT 143-145, 290, 311.) [1]

Jury selection commenced on November 26, 1979. On December 6, 1979, the jury returned its verdicts finding respondent guilty as to all counts, with the murder and attempted murder fixed at first degree, and finding all the special allegations to be true. [2] The penalty phase commenced on December 11, 1979, and on December 19, the jury returned its verdict finding the penalty to be death. On January 25, 1980, respondent's motions to modify the verdict and for new trial were denied. Respondent was sentenced to death for the murder of Kathryn Parrott.

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1. The designation "CT" refers to the Clerk's Transcript on appeal. The designation "RT" refers to the Reporter's Transcript on appeal.

2. Respondent's co-defendant was also found guilty of the robberies and first degree murder and attempted murder, but all the special allegations as to him were found not true.

Sentences of imprisonment were imposed for the other offenses and stayed. (CT 442, 521, 532, 541d, 550, 637-646, 681-684, 716-720.) An appeal from the judgment imposing the death penalty was automatically taken to the California Supreme Court.

A. Facts Relating to the Offense.

On the evening of June 2 and early morning of June 3, 1979, Kevin Pickrell and Kathryn Parrott were working at a Taco Bell restaurant at 2820 South Bristol in Santa Ana. They were expecting to close at 1:00 a.m. Shortly before that time a "customer", later identified as respondent's co-defendant Ruben Gaitan, came in and presented a piece of paper with a food order on it to Kathryn Parrott. (RT 97, 317-320, 330-331.)

As Pickrell was preparing the food order presented by Gaitan, respondent, who was employed at the Taco Bell, entered and asked to check his work schedule. Pickrell indicated that respondent could go into the back to check his schedule. Respondent went to the back, then returned shortly and displayed a gun. Respondent ordered Ms. Parrott and Pickrell into a walk-in refrigerator. Gaitan went into the refrigerator first and removed a fire axe from the wall. That was the last Pickrell saw of Gaitan. (RT 324-335, 373, 376-379, 383-384.)

Respondent ordered Pickrell and Ms. Parrott to sit down in the refrigerator and asked them both for the location of the keys to the safe. They told him the keys were in the safe, and he went out. Pickrell and Ms. Parrott began talking, with Pickrell expressing

the fear that respondent would kill them because he knew them. Respondent returned, told them to be quiet and left again. (RT 336-337, 341-342, 352-353.)

Respondent was gone for about five minutes, then returned and told Ms. Parrott and Pickrell to go to the back of the walk-in. When they got to the back wall, respondent told them to kneel and they did so. He told them to take their hats off and bend their heads down. Respondent told them to say their prayers. Pickrell asked him not to hurt them and respondent just sort of laughed. He told Ms. Parrott to put a rag in her mouth. After that, Pickrell heard her moan and felt her come toward him. He then felt a sharp blow to the back of his head and fell over. He felt another blow to his head and heard

ringing in his ears. (RT 355-362.)

Pickrell lay with his eyes closed, thinking he might be dead, but opened his eyes and saw the floor. He lay there for awhile, then got up, got some change and called the police. When the police arrived he told them it was respondent who had been in the walk-in at the time he was injured. (RT 362-367.)

A police officer who arrived about 1:20 a.m. found Kathryn Parrott lying motionless in the refrigerator with a terrycloth towel stuffed in her mouth, and with no pulse. (RT 2-10, 3-4, 13-17.) The autopsy surgeon concluded Ms. Parrott died from cerebral destruction due to a gunshot wound to the head. There was a single gunshot wound which appeared to be a contact wound. Additionally, she had suffered

two deep lacerations in the back of the head which appeared to have been inflicted at or about the time of death, and had been inflicted by a blunt, heavy object. (RT 69-77.) Kevin Pickrell had suffered lacerations to the back of the head, including one with an area around it which appeared to be a burn or abrasion. It appeared he had been struck in the back of the head with a metallic object that then moved around to the side of the head, hit a bony prominence and shattered, with some fragments continuing on and exiting the head, taking some tissues from the ear as they left. (RT 305-310, 314.)

The manager of the Taco Bell calculated a loss of approximately $1,200.00 from the robbery. (RT 37-41.) Respondent and Gaitan were taken into custody on June 3, and the same

day an apartment at 3101 South Bristol was searched pursuant to a warrant. Money in the amount of approximately $1,000.00 was recovered. (RT 101, 103-105, 117.)

Respondent did not present a defense at the guilt phase. Ruben Gaitan testified in his own behalf and admitted copying a food order which respondent had prepared while they were in the apartment, but denied any connection with the robbery and killing. (RT 452, 455, 457-460, 467-469.)

At the penalty phase the prosecution presented the testimony of one David Lam, who had been in custody for felony non-support in June of 1979. One morning while awaiting to go to court he saw respondent standing in front of him, chained with two other people. He overheard bits and pieces of a conversa-

tion to the effect that they were not going to be found guilty of the charge because they were sure the people were no longer alive. Respondent was saying to the other person how much of a "trip" it was; how the people were on their hands and knees begging for their lives before he shot them. (RT 729-732.) The People also introduced evidence of portions of guns, a notebook, letter and will which were found in the apartment. (RT 754-760, 762-764.)

The presentation of defense evidence concerned the largest portion of the penalty phase.[3/] Respondent testified on his own behalf and admitted robbing and shooting both the victims,

3. Defense evidence presented at the penalty phase is set forth at some length in the opinion of the California Supreme Court. (30 Cal.3d at pp. 564-567; Appendix A, pp. A-10 to A-15.)

but denied that he intended to kill them. He testified that when he first went back into the cooler he had merely knocked out the victims with a piece of iron pipe. Ruben Gaitan had told him it was necessary to kill them, so he had gone back in and pointed the gun at each one of the victims with the intent just to graze them and knock them out. (RT 834-854, 877, 900.) He testified that the only reason he told the victims to say their prayers before he pulled the trigger was just to scare them, and he did not laugh but just smiled. (RT 913, 930.) Respondent also testified to the effect that Kevin Pickrell had laughed at him when he first displayed the gun, and that made him mad. He further testified that he had had one or two drinks and had taken some "speed". (RT 844-846.)

Friends and relatives testified as to respondent's childhood and early youth in San Antonio, Texas. Respondent and his brother had been adopted when they were infants, and both adoptive parents had died by the time he turned fourteen. After that he stopped going to school regularly and began hanging around with bad company, including Ruben Gaitan. Although respondent had gone into the Texas National Guard at one time, otherwise he had worked only at menial jobs. (RT 774-779, 792-800.) A defense psychiatrist expressed the opinion that respondent was an inadequate personality, with a diffused, generalized type of brain damage and elements of a borderline schizophrenic personality. He opined that some of the dynamics of the shooting included respondent's

preexisting personality factors, the taking of amphetamines with alcohol a few hours before, pre-existing brain damage, disordered reality testing, anger at Ruben Gaitan and anger because Kevin Pickrell did not at first take him seriously. The doctor also believed that respondent may have intended only to graze the victims. (RT 959-960, 970-971, 992-1001.)

A defense psychologist testified respondent had a full scale I.Q. of 75, and that the result of a test of neurological impairment indicated mild congenital brain damage. (RT 1069, 1076-1078.)

B. Facts Relating to the Instruction.

After informing the jury of its duty to determine whether the punishment of death or confinement in the

state prison for life without the possibility of parole should be imposed the trial court instructed the jury as follows:

> "In determining which penalty is to be imposed on defendant, you shall consider all of the evidence and all of the applicable instructions on the law which have been received during any part of the trial of this case, except as you may hereafter be instructed.
>
> "You shall consider, take into account and be guided by the following factors, if applicable:
>
> A, The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true;
>
> B, The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;

C, The presence or absence of any prior felony conviction;

D, Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

E, Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

F, Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

G, Whether or not the defendant acted under extreme duress or under substantial domination of another person;

H, Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication;

I, The age of the defendant at the time of the crime;

J, Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

K, Any other circumstances which extenuate the gravity of the crime even though it is not a legal excuse for the crime.

"In weighing the aggravating and mitigating factors, you are not to merely count numbers on either side.

"You are instructed rather to weigh and consider the factors on each side as a whole.

"It is now your duty to determine which of the two penalties, death or confinement in state prison for life without possibility of parole, shall be imposed on the defendant.

"You are instructed that under the State Constitution a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime.

"Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

"After having heard all of the evidence and after having heard and considered the arguments of counsel you shall consider, take into account and be guided by the applicable factors of aggravation and mitigating circumstances upon which you have been instructed.

"You are instructed that the state has the burden of proving that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt.

"Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that state that they cannot say they feel an abiding

conviction to a moral certainty of the truth of the finding.

"If you conclude beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances you shall impose a sentence of death.

"If you are not satisfied beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances you shall impose a sentence of cinfinement in the state prison for life without the possibility of parole." (RT 1188-1191.)

C. How the Federal Question is Presented.

In the trial court counsel for respondent filed a motion to delete from the court's instructions that portion relating to the Governor's power to modify the sentence of life imprisonment without possibility of parole to a lesser sentence. (CT 665-671.) The motion was denied on the

ground that the instructions was expressly provided for by legislation. (RT 718.) On the appeal respondent argued in his brief and at oral argument that the instruction denied due process. Petitioner argued in its brief (Respondent's Brief pp. 146-155) and at oral argument that the instruction was required by a presumptively valid statute which was not shown to be unconstitutional, and that the instruction had no tendency to mislead the jury or prejudice a defendant. In its opinion the Supreme Court of California held that the instruction violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. (30 Cal.3d at pp. 600-601; Appen. A, pp. A-128 to A-129.) Petitioner's timely petition for rehearing urged that the California Supreme Court's decision was

erroneous and the instruction required by the statute did not violate any federal constitutional provision. (Pet.Reh., pp. 2-16.)

REASONS FOR GRANTING THE WRIT

The California Supreme Court has erroneously disregarded the legislative will and wisdom of the millions of California electors who enacted the statute which requires juries in California death penalty cases (composed primarily of California electors) be informed of the fact that the alternative sentence of life imprisonment without possibility of parole may in future be modified to include the possibility of parole. The decision conflicts in principle with the decisions of the highest courts of other states which have determined that when

a jury must choose between alternative punishments it is entitled to know what the alternatives are, and conflicts in principle with decisions of this Court which recognize that a jury is entitled to adequate information. This case is important because the opinion below thwarts the will of the citizens of this union's most populace state to enforce an effective death penalty law; also because it presents a question common to every one of the vast majority of states which have enacted death penalty laws, i.e., whether those laws are entitled to the deference which the Constitution otherwise requires or whether they may be capriciously or lightly overturned on the sheerest speculation of invalidity.

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ARGUMENT

I

INFORMING THE JURY AT THE PENALTY PHASE IN A DEATH PENALTY CASE AS TO THE INDISPUTABLE FACT THAT HE MAY POSSIBLY BE PAROLED IF A SENTENCE OF LIFE IMPRISONMENT IS IMPOSED DOES NOT DENY A DEFENDANT ANY RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY WHERE THE JURY IS INSTRUCTED REGARDING FACTORS TO CONSIDER AND FURTHER INSTRUCTED THAT THE DEATH PENALTY MAY NOT BE IMPOSED UNLESS THE JURY FINDS THAT AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES

Under California Penal Code section 190, a person guilty of murder in the first degree is punishable by death, confinement in state prison for life without possibility of parole or confinement in state prison for a term of 25 years to life. California Penal Code section 190.3 requires the trier of fact to determine, in a case where

a person has been found guilty of murder of the first degree and certain special circumstances found true, whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole.

The term "life imprisonment without the possibility of parole" does not literally mean what it says, since a person sentenced to that term always retains the possibility that he may be paroled. As pointed out in a recent California case:

> ". . .The punishment of life imprisonment without possibility of parole is not as awesome or as comprehensive as pointed out by appellant. He is not without recourse and the penalty is not tantamount to spending the rest of his life behind bars. Available is the Governor's power of commutation (art. V, § 8, Cal.Const.), procedures for commutation of a prisoner

> sentenced to life imprisonment without possibility of parole (§§ 4800-4814, Pen. Code) and the liberal policies therefor set out in title 15, California Administrative Code." (People

v. Noble (1981) 126 Cal.App.3d 1011, 1018-1019.) Under the provisions of Penal Code section 4801, the Board of Prison Terms is empowered to report to the Governor the names of prisoners who, in the judgment of the Board, should have their sentences commuted. Title 15, section 2817 of the California Administrative Code provides for Board review of the case of a prisoner serving a sentence of life without possibility of parole twelve years after his reception and every third year thereafter to determine whether a recommendation for commutation or pardon should be made. The difference between release on parole of one sentenced to life imprisonment

with possibility of parole and sentenced to life without possibility of parole is that release of the latter requires the approval of both the Board of Prison Terms and the Governor while release of other life prisoners may be effected by the Board of Prison Terms alone. (People v. Matthews (1979) 98 Cal.App.3d 453, 459.)

Since the phrase "life without the possibility of parole" suggests a prisoner sentenced to that term is without recourse and must spend the rest of his life behind bars it is misleading. Consequently jurors faced with the task of determining which alternative punishment to impose, death or life imprisonment without parole, may act under a distorted perception of the difference between those alternative punishments if the latter is not more

accurately defined.

The possibility death penalty juries may be misled by the phrase "without the possibility of parole" was corrected by an amendment to California Penal Code section 190.3 enacted as part of an initiative measure adopted on November 7, 1978. More than six million Californians voted on the measure, 71.1% (4,480,275) in favor and 28.9% (1,818,357) against. (Statement of Vote and Supp., Gen.Elec., (Nov. 7, 1978), compiled by March Fong Eu, Secretary of State.) The section now provides in part:

> "The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California."

It is the instruction required by section 190.3 which the California Supreme Court held violates the Federal Constitution by interjecting irrelevant considerations into the sentencing process and by failing to inform the jury that a death sentence could be commuted. (People v. Ramos, supra, 30 Cal.3d at pp. 590-602; appen. A, pp. A-95 - A-132.) The California Supreme Court's opinion misses the point of the instruction and is based on speculation totally devoid of any support in the record or otherwise.

The point of the instruction is to avoid having jurors misled as to the meaning of the term "without the possibility of parole." The instruction called for by statute prevents misunderstanding by providing a more accurate perception of the different punishments between which the jury is re-

quired to choose. It would appear self evident that a jury (or judge) determining which of two punishments to impose should know what they are. It is absurd to suggest that a defendant in any case has a due process right to have the sentencing authority misled as to the effect of a sentence. However, that appears to be precisely what the California Supreme Court suggests when it argues that the fact the sentence of life without the possibility of parole includes the possibility of parole is irrelevant to the jury's decision.

The California Supreme Court again misses the point when it suggests the statutorily required instruction is misleading because it tells only half the story of the Governor's power of commutation by not informing the jury the Governor can commute a sentence

of death. The "story" is not the Governor's power of commutation. It is the meaning of the term "without the possibility of parole."

Defense counsel did not request that the instruction be amplified to include information concerning commutation of death sentences. If he had, his peers would have deemed him incompetent because such an instruction might conceivably dilute the jury's sense of responsibility in imposing the penalty of death, with no conceivable benefit to the defendant.

The California Supreme Court suggests that because the jury is informed a defendant may possibly be paroled if given the alternative sentence, but is not informed the sentence of death may be commuted, it is led to believe that the only way to be

sure the defendant is not again let loose upon society to repeat his crime is to impose the sentence of death. Since the thrust of the instruction is the effect of the sentence of life without possibility of parole there is no logical reason why the instruction should mislead the jury regarding a different subject, commutation of the death sentence. As has been noted in a different context, "a juror is not some kind of a dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in a jury box." (People v. Long (1974) 38 Cal.App.3d 680, 689.) There is no basis for the assumption a juror will ignore his oath and all the other instructions and impose a death penalty merely to prevent a possible parole in the distant

future.

The evidence in this case established beyond any question that respondent had coldly planned to commit a robbery at his own place of employment, intending from the outset to murder his fellow employees so they would not identify him. The prosecutor urged the jury not to return the death penalty unless they felt it was an execution murder. (RT 1120.) On a motion to modify the verdict of death the trial judge was in total agreement with the jury that factors in aggravation greatly outweighed any factors in mitigation. (RT (pronouncement of judgment) 6-14.) The jury was fully instructed as to the factors to consider in determining the punishment and there is not the slightest indication in the record that the jury failed to follow its instructions

or that there was any reason for it to do so.

* * * * *

II

THE DECISION OF THE CALIFORNIA SUPREME COURT CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF THE HIGHEST COURTS OF OTHER STATES AND THE DECISIONS OF THIS COURT

Neither this Court nor the highest court of any other state has had occasion to consider whether a statutorily mandated instruction regarding the possibility of parole denies a defendant any federal constitutional right. For that matter no other case suggests that such an instruction affects any federal constitutional right.

The most recent case concerning informing the jury regarding parole at the penalty phase of a capital case is Brewer v. State (Ind. 1981) 417 N.E. 2d 889. In that case in response to a jury question at the penalty phase the trial judge informed the jury that the range of sentences for murder, if a

death penalty was not imposed, was a fixed sentence of from 30 to 60 years and that one sentenced could earn credit for good behavior to apply against the sentence, with a maximum allowable credit of 50% of the sentence. The Supreme Court of Indiana held it was proper for the trial judge to so inform the jury and observed:

> "The ultimate determination cannot be made in a vacuum. Hence recommendations, if they are to have relevance, must be arrived at in the light of available alternatives. Given the task of the jury at this stage of the hearing, it is altogether proper that they be fully aware of the consequences of a prison sentence as well as of the consequences of a death sentence." (Id., at p. 909.)

The Supreme Court of Nevada has also held that it is proper to inform the jury in a death penalty case that an alternate punishment of life without

possibility of parole is subject to review at a later date. (Summers v. State (Nev. 1970) 467 P.2d 98, 99-100.)

Cases from a number of states have recognized that the availability of parole and commutation in capital cases is readily understood among lay persons. (See e.g., State v. Cherry (N.C. 1979) 257 S.E.2d 551, 561; Paramore v. State (Fla. 1969) 229 So.2d 855, 860; State v. Carroll (Wyo. 1937) 69 P.2d 542, 559-564.) And in Grandsinger v. State (Neb. 1955) 73 N.W.2d 632, 651 the Nebraska Supreme Court pointed out that the prosecutor's comments regarding the availability of pardon or parole was simply a statement of existing law which all men, including jurors, were presumed to know, and concluded that "it would be perversion of truth and justice" to hold that the

prosecutor's comments required reversal of th death penalty. (Id., at p. 651.)

Until this case the Supreme Court of California had also recognized that jurors are likely to be aware that persons sentenced to life imprisonment may be granted parole. It had held that jurors should be informed generally concerning the parole laws (People v. Morse (1964) 60 Cal.2d 631, 647) but should not be informed of the power of the trial court or Governor to reduce a sentence of death to life imprisonment (Id., at p. 649).

What is apparent is that there is a difference of opinion among state courts as to whether it is better to inform jurors concerning the possibility of parole. The Supreme Court of California has escalated that question to Federal Constitutional dimensions and

it should be decided by this Court.

The decisions of this Court recognize the constitutional presumption that even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is not warranted because a court believes a political branch has acted unwisely. (See e.g., Vance v. Bradley (1979) 440 U.S. 93, 97; Snyder v. Massachusetts (1934) 291 U.S. 97, 122. See also Gregg v. Georgia (1976) 428 U.S. 153, 175.)

In Gregg v. Georgia, supra, the Court indicated that the concerns the penalty of death not be imposed in an arbitrary or capricious manner can be met by a system which provides for bifurcated proceedings at which the sentencing authority is apprised of the information relevant

to the imposition of sentence and provided with standards to guide its use of the information. (428 U.S. at p. 195.) However, neither in Gregg nor in any other case decided by this Court was it suggested that a state may not constitutionally decide that the possibility of future parole (if a defendant is not sentenced to death) is relevant to the jury's decision. Indeed this Court approved the Texas system in which a specific question presented to the jury is "whether there is a possibility that the defendant would commit criminal acts of violence that would constitute a continuing threat to society". (Jurek v. Texas (1976) 428 U.S. 262, 269, 274-277.) Thus, this Court has necessarily rejected the notion that a death penalty jury may not legitimately consider what

a defendant might do in future -- in or out of prison -- if not sentenced to death.

Since the decision of the California Supreme Court conflicts in principle with recent decisions of the highest courts of other states and this Court, the petition for certiorari should be granted.

* * * * *

III

THE FEDERAL CONSTITUTIONAL ISSUE PRESENTED IN THIS CASE IS AN IMPORTANT ONE SINCE IT GOES TO THE HEART OF THE VITAL RIGHT OF CITIZENS TO PROTECT THEMSELVES BY ENACTING CRIMINAL STATUTES

As this Court noted in Gregg v. Georgia, supra, 428 U.S. 153 at p. 181, the people of California responded immediately to amend their constitution when the California Supreme Court, in 1972, held the death penalty cruel or unusual. The initiative statute involved in this case, again enacted by an overwhelming majority of Californians, is a continuation of the effort by California citizens to protect themselves by enacting and enforcing a constitutionally valid and effective death penalty law.

This Court has noted in a different context that the right of

suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of a franchise. (Reynolds v. Sims (1964) 377 U.S. 533, 555.) In this case the California Supreme Court has refused to attach any weight to the judgment of the State's electors and substituted its own judgment as to what relevant information a penalty jury should have. The more than twenty million citizens of the State of California are entitled to a ruling by this Court that their rights cannot be so destroyed under the guise of a Federal Constitutional due process requirement.

The question in this case is vitally important to the rights of the citizens of California, and its resolution is also important to the citizens

of all other states.

It is now established beyond question that the United States Constitution does not prohibit states from enacting death penalty statutes for the protection of their citizens. It necessarily follows that those statutes are constitutionally entitled to the same deference and presumption of validity as any others. If a statute of California, or any other state, may be declared unconstitutional because of "gossamer possibilities of prejudice to a defendant" (Snyder v. Massachusetts, supra, 291 U.S. 97, 122) then the legitimate goals of the states are frustrated and there is danger that the criminal law will be brought into contempt and constitutional immunities discredited. (Id.)

/

It is vitally important to the citizens of all states to establish that the rights of innocent citizens may not be sacrificed on the altar of misperceived concepts of perfect justice for convicted murders.

* * * * *

For the foregoing reasons petitioner respectfully submits that the writ of certiorari should issue to review the decision of the Supreme Court of the State of California.

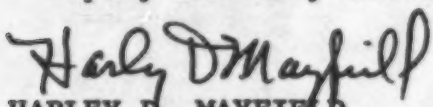
Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General

ROBERT H. PHILIBOSIAN,
Chief Assistant
Attorney General
Criminal Division

DANIEL J. KREMER,
Assistant Attorney
General

A. WELLS PETERSEN
Deputy Attorney General



HARLEY D. MAYFIELD,
Deputy Attorney General

Attorneys for Petitioner

AFFIDAVIT OF SERVICE BY MAIL

ATTORNEY:

George Deukmejian, Attorney General
Harley D. Mayfield,
Deputy Attorney General
110 West "A" Street, Suite 700
San Diego, California 92101

No. _____

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, Suite 700, San Diego, California 92101.

I served the within PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT: an original and 39 copies on the United States Supreme Court as follows: Michael Rodak, Jr., Clerk, U.S. Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Alan M. Caplan, Esq.
680 Beach Street, Suite 365
San Francisco, CA 94102

State Public Defender
1390 Market Street, Suite 425
San Francisco, CA 94102

Cecil Hicks
District Attorney
County of Orange
Courthouse
P.O. Box 808
Santa Ana, CA 92702

California Supreme Court
350 McAllister Street, Room 4050
San Francisco, CA 94102

Court of Appeal
Fourth Appellate District
Division Two
303 West Third Street
Room 640
San Bernardino, CA 92401

Lee A. Branch, Clerk
County of Orange
Courthouse
P.O. Box 838
Santa Ana, CA 92702
FOR DELIVERY TO THE HON.
R.J. BEACOM, JUDGE

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 12 day of April 1982.

There is a delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, April 12, 1982.

CLIFFORD E. REED, JR.

Subscribed and sworn to before me this 12th day of April, 1982

Vida M. Allen
Notary Public in and for said County and State

VIDA M. AILEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 19, 1982

AFFIDAVIT OF SERVICE BY MAIL

Appendix

81-1893

Supreme Court, U.S.
FILED
APR 13 1982
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

GEORGE DEUKMEJIAN,
Attorney General
ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General
Criminal Division
DANIEL J. KREMER,
Assistant Attorney General
A. WELLS PETERSEN,
Deputy Attorney General
HARLEY D. MAYFIELD,
Deputy Attorney General

110 West "A" Street, Suite 700
San Diego, California 92101
Telephone: (714) 237-7759

Attorneys for Petitioner

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APPENDIX A

[Filed January 25, 1982]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CRIM. NO. 21352

(Sup.Ct.No. C-42382)

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCELINO RAMOS,

Defendant and Appellant.

Appellant Marcelino Ramos and his codefendant Ruben Gaitan (not a party to this appeal) were charged with two counts of robbery, one count of murder, and one count of attempted murder in connection with a robbery and shooting incident at an Orange County fast food establishment which occurred in June of 1979. A jury convicted both defendants on all counts,

and found the murder and attempted murder to be of the first degree. The jury further found with respect to appellant that the charged "special circumstance" was true, i.e., that the murder was committed while appellant was engaged in the commission of a robbery. (Pen. Code, § 190.2(a)(17)(i).) It did not find the charged "special circumstance" true with respect to co-defendant Gaitan.

-- SEE CONCURRING AND --
-- DISSENTING OPINION --

The special circumstance finding initiated a second phase penalty trial to determine whether or not appellant should suffer the death penalty. This phase lasted approximately one week. On December 11, 1979, the jury returned a verdict of death. The appeal to this court is automatic.

(Cal. Const., art. VI, § 11; Pen. Code, § 1239, subd. (b).)

The instant case is our first opportunity to consider a judgment of death imposed pursuant to the 1978 death penalty initiative approved by voters on November 7 of that year. Popularly known as the Briggs Initiative, the 1978 law contains several significant changes from the 1977 law, the constitutionality of which was approved by four members of this court in People v. Jackson (1980) 28 Cal.3d 264. Without offering any opinion as to other possible challenges, we have concluded that several recent United States Supreme Court cases mandate our holding unconstitutional on due process grounds the portion of the 1978 statute which requires the penalty phase jury to be instructed regarding the Governor's

power to commute a sentence of life imprisonment without possibility of parole. Accordingly, the judgment of death must be reversed due to the use of this unconstitutional "Briggs Instruction." The judgment of guilt as to the murder, attempted murder, and robbery counts is affirmed.

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I. STATEMENT OF FACTS

Late on the night of June 2, 1979, Kathryn Parrott and Kevin Pickrell were working at a Taco Bell restaurant located in Santa Ana, California. They were due to close at 1 a.m. Just prior to that time, however, a customer later identified as codefendant Gaitan entered the establishment and placed a food order. While the order was being prepared, appellant entered. Pickrell recognized him because appellant was currently employed at the Taco Bell as a janitor. Appellant asked to check his work schedule and Pickrell admitted him to the work area behind the front counter.

Approximately a minute later, appellant emerged from the back carrying a rifle partially covered with a coat. Thinking it was some sort of

joke, Pickrell began laughing, but appellant informed him that he wasn't kidding. He advised Gaitan to hop over the front counter and then directed both Pickrell and Parrott inside the restaurant's walk-in refrigerator, facing the back wall. Pickrell testified that appellant acted in a manner unlike any time he had seen him in the past, almost as though he did not recognize Pickrell or Parrott. Pickrell suspected that appellant might have been under the influence of some type of drug.

A substantial period of time elapsed during which appellant entered and emerged from the walk-in refrigerator on several occasions. He inquired about the keys to the restaurant safe and repeatedly told Pickrell and Parrott to keep quiet. When appellant

entered for the last time, he instructed Pickrell and Parrott to kneel on the floor of the refrigerator and remove their hats. He told Parrott to place a rag in her mouth. During this entire period of time, Pickrell and Parrott could not see appellant because they had their backs to him.

Pickrell testified that the next thing he remembered was feeling Kathryn Parrott fall toward him. Almost simultaneously, he felt a sharp blow to the back of his head and also fell over. Sometime subsequent to that, he felt another blow to his head followed by a ringing in his ears. He testified that he never heard a gunshot or smelled smoke. He lay on the floor until he could hear no movement in the building. He then got up, discovered Parrott's body next to him, and re-

ported the incident to police. When police arrived, they found that Parrott was dead.

Pickrell was treated in the emergency room of a nearby hospital that night for lacerations on the back of his head. The treating physician also noted two smaller lacerations behind the right ear and a piece of tissue missing from the ear itself, which could have been caused by a glancing gunshot. The autopsy performed on the body of Kathryn Parrott indicated that she had died of a gunshot wound to the head. The examination also disclosed two lacerations to the back of the head, inflicted at or near the time of death, most probably caused by a blow from a blunt, heavy object.

Appellant and Gaitan were arrested on June 3. A search pursuant

to a warrant of the apartment in which they were living yielded over $1,000, which roughly approximated the amount of money taken in the Taco Bell robbery. Additional items seized included torn pieces of a diagram of the Taco Bell restaurant and pieces of a Mexican food order form.

Trial commenced on November 26, 1979. Defense counsel presented no evidence at the guilt phase and appellant did not take the stand on his own behalf. 1/ Counsel also offered no closing argument. Not surprisingly, on December 6 the jury returned a verdict of guilty as to all counts and also found the charged special circumstance to be true as to appellant.

1/ Codefendant Gaitan testified at the guilt phase and denied any participation in either the robbery or the shootings.

As already noted, although the jury found codefendant Gaitan guilty of first degree murder and robbery, it did not find the charged special circumstance to be true as to him.

The evidence presented by the prosecution at the penalty phase consisted of some photographs of two rifles seized during the search of the apartment, a letter and will written by appellant, and testimony by David Lam, who allegedly overheard portions of some remarks made by appellant while both men were occupying a holding cell at the county courthouse. Lam testified that he heard appellant admit shooting the victims and say that he enjoyed hearing them beg for their lives.

The presentation of defense evidence consumed the largest portion

of time during the penalty phase, providing considerable background information concerning appellant's childhood and adolescence in San Antonio, Texas. He and his brother were adopted as infants. His adoptive father died when he was 8; his mother died when he was 13 or 14. From that point on, appellant and his brother (who was two years older) lived by themselves, although some supervision was provided by a maternal aunt.

Psychological testing placed appellant in the borderline retardation category, with a full scale IQ of 75. He was diagnosed as having congenital brain damage. One psychologist characterized him as borderline schizophrenic.

Testimony by friends and family in San Antonio indicated that

after the death of his mother, appellant began associating with a "bad" element. His closest friend among this new group was Ruben Gaitan. Appellant's brother, Mario, testified that Gaitan became the leader of the pair because of appellant's suggestible personality. Gaitan was very excited by terrorism and terrorist-type activities; he was known to possess several weapons. Mario stated that he continually warned appellant to stay away from Gaitan but the warnings were to no avail. Mario explained that he lent his brother the money to come to California only on the condition that he would not go with Gaitan. Gaitan decided to come to California with appellant at the last moment and appellant did not resist. Testimony by several individuals indicated that both before and after leaving San Antonio, appellant was

unsuccessful at holding down any job more involved than menial janitorial work.

Appellant also testified on his own behalf at the penalty phase. He admitted the robbery and shooting the victims, but he denied intending to kill them. He explained that he had hit each one on the head with a metal pipe, but that Gaitan instructed him that each must be killed to prevent their identifying appellant and himself. Appellant then re-entered the refrigerator, intending to make it look as though he had killed both Parrott and Pickrell. He testified: "My intentions were not to kill them; my intentions were to just graze them, kind of knock them out because I wasn't too sure, and since I hadn't checked them before, if they were knocked out or not, and when I walked back in, I didn't

check if they were knocked out or not. . . . I pointed the weapon at an angled position, like upwards, to sort of graze them, and I fired the shot. . . . After I shot, I turned around and I looked at Mr. Pickrell, Kevin, and went in back of him about a foot away, and I fired at an angle position at him, too."

Appellant also admitted to regular and heavy use of drugs and alcohol. He recalled having ingested both amphetamines and alcohol shortly before the robbery. Psychiatric testimony suggested that drug and alcohol use would substantially exacerbate appellant's mental inadequacies and perhaps lead to unusually aggressive or hostile behavior. It was established that appellant had no prior criminal record nor any history of violence in

any other setting.

We turned first to appellant's contentions that various errors during the guilt phase of his trial necessitate a reversal of the murder, attempted murder and robbery convictions.

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II. GUILT PHASE ISSUES

A. Appellant's motion to supress evidence was properly denied.

As noted previously, appellant and codefendant Gaitan were arrested on the morning of June 3, 1979. A warrant was then obtained authorizing a search of the apartment at which they were both living at the time. Appellant argues that the evidence obtained pursuant to the search should have been suppressed on numerous grounds.

1. Supplemental statement of facts.

At approximately 2 a.m. on June 3, Santa Ana Police Officer Buckels was assigned to investigate the robbery/homicide at the Taco Bell. When he arrived at the scene, he was informed by Sergeant Hindman that the surviving

victim had identified one of the robbers as appellant. A search of the employment records at the Taco Bell yielded two possible addresses: 1313 West Tolliver and the Santa Ana Hotel on North Main Street. Appellant's employment application also indicated that the person to contact in case of an emergency was Ruben Gaitan with an address of 1331 South Bristol. The apartment number was 23_, the third digit being illegible.

After some preliminary investigation, Officer Buckels telephoned the Santa Ana Hotel and was informed by a hotel employee that appellant had checked out on May 31. Buckels then proceeded to 1313 West Tolliver at approximately 5 a.m. and questioned Joe Calderon and a Mr. Escamilla. Escamilla told Buckels that both appellant and

Ruben Gaitan had lived at his residence for approximately one month after arriving in California from San Antonio, but that both had moved out two months earlier. Calderon stated that he had gone to school with appellant and Gaitan in San Antonio. He told Buckels that the two were close friends and would probably be found together. Gaitan, he explained, worked at the South Coast Plaza Hotel on Bristol, and both appellant and Gaitan were living in an apartment complex in the 3100 block of South Bristol on the east side of the street. Calderon could provide no specific address or apartment number.

Calderon gave Buckels a description of Gaitan as a stocky, five-foot two-inches tall Mexican male, twenty to twenty five years old, clean

shaven with collar length dark brown hair and a small tattoo between the thumb and forefinger of one hand. He mentioned that he had never seen either of the two with a rifle, but that Gaitan had told him that he had one. Calderon opined that if the two were in some sort of trouble, they would probably attempt to return to San Antonio.

Buckels next went to the South Bristol apartment complex at shortly after 6 a.m. but was unable to locate either appellant's or Gaitan's name on any of the mailboxes. He then returned to police department headquarters and telephoned the apartment complex manager, who told him she might be able to help him locate the two individuals whom he described to her.

Buckels then returned to the apartment complex with Sergeant Hindman

at approximately 7 a.m. and contacted the manager. She explained that she believed the men he was looking for were in apartment number 231. She showed Buckels a copy of the rental application for the apartment which indicated that the tenants were named Zavala and Rubalcava. Both were listed as being employed at the South Coast Plaza Hotel.

While Buckels was speaking with the manager, Hindman informed him that an individual matching the description of Ruben Gaitan had just emerged from apartment number 231 and was proceeding down the street. Hindman and Buckels caught up with the individual, advised him that they were police officers, and asked for identification. As the individual reached for his wallet, the officers observed a small tattoo between the thumb and forefinger.

From the wallet he produced an identification card from the South Coast Plaza Hotel bearing the name Ruben Gaitan. In response to questioning, he informed Buckels that he lived in apartment number 231 and that appellant and Jose Zavala were currently in the apartment. Gaitan was then handcuffed and placed in the back of a patrol car.

When other police officers, whom Sergeant Hindman had requested, arrived, Hindman and Officer Arango approached the front door of apartment number 231. One of the other officers informed them that someone was attempting to escape via the back window to the apartment. Hindman knocked on the door, advised the residents that he was a police officer, and told them to open the door. Officer Arango, who was bilingual, also repeated the advice in

Spanish. Jose Zavala opened the door and Hindman observed appellant standing behind him, matching a description police had previously constructed from several sources. Both appellant and Zavala were handcuffed and the apartment checked for other occupants. When none were discovered, the apartment was secured so that a search warrant could be obtained.

A telephone search warrant was issued by Judge Robert Knox of the West Orange County Municipal Court at 9:41 a.m. The affiant was Detective G.R. Clark of the Santa Ana Police Department. Detective Clark related the substance of the investigation which led to the arrest of appellant. Judge Knox concluded that this information constituted probable cause to search the premises at 3101 South

Bristol, apartment number 231.

The warrant authorized the seizure of items in eight separate categories: "(1) guns, rifle and hand types, (2) clothing, (3) ammunition, (4) money, U.S. currency, (5) any Taco Bell papers or property, (6) personal papers of any individual, including Marcelino (NMN) Ramos inside the apartment, (7) bloody items of any type, clothing, papers, and money, (8) any papers, bills, letters addressed to occupants or visitors of this apartment."

The warrant was executed by Officer Buckels in conjunction with another Santa Ana Police Department officer and two Orange County Sheriff's deputies. The return to the search warrant indicates that several hundred items were seized, although few were

ever introduced in evidence against appellant.

Appellant contends that the evidence seized pursuant to the warrant should have been suppressed on numerous grounds. He argues that the search was tainted by: (1) the illegal detention and arrest of Ruben Gaitan; (2) police violation of Penal Code section 844's knock-notice requirements; and (3) the illegal arrest of appellant in violation of People v. Ramey (1976) 16 Cal. 3d 263. Appellant also urges (4) that the search categories authorized by the warrant were broader than justified by the facts contained in the affidavit; (5) that items seized during the search exceeded the terms of the warrant and lacked any "nexus" to the crime under investigation; and (6) that the warrant was invalid because it was not signed

by the magistrate prior to its execution. For the reasons stated below, we conclude that while some of appellant's arguments may have technical merit, he was not prejudiced by any of the claimed errors.

2. The detention of co-defendant Gaitan was proper.

Appellant contends that the police detention of Ruben Gaitan as he left his apartment was illegal, and thus requires that all subsequent evidence obtained by police be suppressed.[2/] We conclude, to the contrary, that Gaitan's detention was an appropriate step in a reasonable police investigation.

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2/ Appellant also appears to argue that the subsequent arrest of Gaitan was illegal. But since all the information provided by Gaitan was given to police prior to arrest, the legality of the arrest would not affect the admissibility of the evidence seized pursuant to the warrant.

In In re Tony C. (1979) 21 Cal.3d 888, 892-893, we explained, "It is settled that circumstances short of probable cause to make an arrest may justify a police officer stopping and briefly detaining a person for questioning or other limited investigation. . . . [I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity." We noted the converse of this standard in People v. Moore (1968) 69 Cal.2d 674, 682-683 when we stated that "a police officer may not detain and question a person

when there are no circumstances which would indicate to a reasonable man in a like position that such a course was necessary to the proper discharge of the officer's duties." (See also People v. Bower (1979) 24 Cal.3d 638, 644.)

In the instant case, the detention of Gaitan was clearly "necessary to the proper discharge of the officer's duties." (Moore, supra.) Officer Buckels had been told by Joe Calderon that appellant and Gaitan would likely be found together. Appellant's accomplice in the robbery was as yet unidentified and police reasonably suspected that Gaitan might be involved. Calderon had given Buckels a fairly detailed description of Gaitan, and information from several sources indicated that Gaitan was currently

living in apartment number 231. When an individual matching Gaitan's description left the apartment, the officers would have been remiss in their duties had they not detained the individual for questioning in hopes of locating appellant and identifying the second suspect. We therefore conclude that the detention of Ruben Gaitan was proper.

3. Any technical failure by police to comply with Penal Code section 844 did not prejudice appellant.

In the brief questioning following the detention, Gaitan identified himself and informed Officer Buckels that appellant was inside apartment number 231. Officers then knocked on the door and identified themselves as police officers. Jose Zavala voluntarily opened the door.

Appellant contends that because the officers failed to articulate their purpose, they did not comply with the knock-notice requirements of Penal Code section 844. 3/

Appellant's argument is technically correct; the police officers did not literally comply with section 844's requirement that they announce their purpose. Since it is established for the purposes of section 844 that a "breaking" includes "uninvited entries through open doors [citations], even where the door is opened in response to a police officer's knock [citation]"

3/ Section 844 provides: "To make an arrest, a . . .peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

(People v. Baldwin (1976) 62 Cal.App.3d 727, 739), the police entry here violated the literal terms of section 844.

The information used by the police in support of the contested warrant, however, was all obtained prior to the actual entry of the house which appellant claims was illegal. As soon as the door to the apartment was opened by Jose Zavala, police observed appellant inside. That information in itself was sufficient to support issuance of the search warrant. Accordingly, we conclude that even if failure by the police to comply with the literal requirements of section 844 cannot be excused, such noncompliance did not taint the search warrant and would not necessitate the suppression of any subsequently seized evidence. (See generally Wong Sun v. United States

(1963) 371 U.S. 471, 488.)

4. Even if police failure to secure an arrest warrant for appellant violated People v. Ramey (1976) 16 Cal.3d 263, the illegal arrest did not taint the subsequently obtained search warrant.

Appellant argues that his warrantless arrest inside apartment number 231 violated People v. Ramey, supra, where we concluded that "warrantless arrests within the home are per se unreasonable in the absence of exigent circumstances." (Id., at p. 276.) He contends that since the warrantless arrest preceded the obtaining of a search warrant for the apartment, any subsequently seized evidence must be ordered suppressed.

Assuming arguendo the merit of appellant's argument, [4/] we note

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4/ The Attorney General argues (fn. continued)

that he is still unable to demonstrate how the illegal arrest in any way facilitated the obtaining of the warrant and the subsequent seizure of evidence. The analysis is analogous to that already described with respect to the alleged violation of Penal Code section 844. (See p. ___, ante [typed opn. at p. 17].) Appellant concedes that it is the entry of the apartment by police which gave rise to any possible illegality; Ramey is not vio-

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(fn. continued)
that exigent circumstances excused police failure to obtain an arrest warrant in this case. He focuses on the time period following Gaitan's statement that appellant was presently inside the apartment and contends that the police officers should not have been expected to wait for an arrest warrant to arrive. In addition, of course, the police had previously received information indicating that if defendant were in trouble, he would probably be attempting to leave the state for San Antonio.

lated if police merely knock on the door without an arrest warrant. When Jose Zavala opened the door to the apartment, before the police entered, the police observed an individual in plain view standing behind Zavala. It is this information connecting appellant with the apartment, obtained prior to any allegedly illegal police conduct, which formed the basis for the search warrant. 5/ In fact, the telephonic affidavit in support of the search warrant did not even mention that appellant had been arrested. The affidavit merely recited, "Contact was made at the front door of the apart-

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5/ It should be noted that police observations merely corroborated what Ruben Gaitan had told them earlier, i.e., that appellant and Jose Zavala were present in the apartment.

ment by officers and, upon contact, the individuals coming to the front door were identified as Marcelino Ramos and another person, by the name of Jose Zavala."

We therefore conclude that even if the warrantless arrest of appellant violated People v. Ramey, supra, it would not require the invalidation of the search warrant and the suppression of any evidence.

5. Appellant does not demonstrate that he was prejudiced by any overbreadth in the search warrant's description of items to be seized.

As noted previously, the search warrant issued by Judge Knox listed eight categories of items to be searched and seized. (See p. ___, ante [typed opn. at pp. 12-13].) Appellant particularly complains that categories (2) "clothing," (6) "personal papers"

of appellant or any other individual, and (8) "any papers, bills, letters addressed to occupants or visitors of [the] apartment," were unnecessarily broad and in effect authorized a general exploratory search. (See Burrows v. Superior Court (1974) 13 Cal.3d 238, 249-250; Thompson v. Superior Court (1977) 70 Cal.App.3d 101, 112.)

Even if we assume that the challenged categories were overly broad, appellant has not shown that any item of incriminating evidence introduced at trial was seized pursuant to the questioned portions of the warrant. He has thus failed to demonstrate prejudice affecting the judgment of guilt. (See Aday v. Superior Court (1961) 55 Cal.2d 789, 797.)

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6. To the extent that the search exceeded the terms of the warrant, the seizure of additional items was justified by a demonstrated nexus between those items and the crime under investigation.

Appellant identifies 13 specific items seized during the search and argues that the seizures were not authorized by the warrant. He recognizes the "plain view" exception to the warrant requirement which we explained in Skelton v. Superior Court (1969) 1 Cal.3d 144, 157: "When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently, as a result of the officer's efforts." (See also People v. Superior

Court (Meyers) (1979) 25 Cal.3d 67, 73-74.) Appellant contends, however, that the Skelton exception is inapplicable because the items seized were not reasonably identifiable as contraband or other seizable evidence.

The seized items identified by appellant include: (1) a black cloth with two cutouts which appeared to be a mask; (2) a five-inch long cylinder of screening material which officers believed to be a silencer; (3) an unfired .30-caliber carbine round; (4) two books: Anarchists Cookbook and Poor Man's James Bond; (5) a notebook entitled "The Private Journal of Ruben Gaitan, aka Frank Rodriguez"; (6) a firing mechanism from a .32-caliber M-1 rifle; (7) gun stocks; (8) a four-by-fifteen telescopic sight; (9) a spiral notebook with the initials

"M.R."; (10) a two-page letter entitled "To My Brother"; (11) a hand-written page entitled "Last Will of Romo"; (12) torn pieces of paper which appeared to be a diagram (later turned out to be a drawing of the Taco Bell); (13) a torn order form for Mexican food.

The Attorney General responds by noting that many of the challenged items arguably fall within properly drawn categories of the search warrant. Items (3), (6) and (7) clearly constitute firearms and ammunition (search warrant categories one and three). Respondent also asserts that items (2) and (8) fall within a reasonable interpretation of those categories. Items (5), (9), (10) and (11) seem to be personal papers within the sixth category of the warrant. This leaves items (1), (4), (12) and (13). The

record does not reflect that items (1) and (4) were ever introduced into evidence during either the guilt or penalty phases and appellant does not suggest otherwise. [6/] He is thus unable to meet his burden of establishing prejudice even if they were improperly seized. [7/] The necessary nexus for the other two items is patently obvious. A Mexican food order form (item (13)) was clearly relevant to establish a connection to a Taco Bell robbery. And

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6/ It also appears that items (2), (4) and (9) were not introduced into evidence.

7/ The Attorney General argues that item (1) was clothing (category two of the warrant) and that the searching officers might reasonably suspect that a mask was used in the robbery, although there was no evidence to that effect. He contends that item (4) (the two books) consisted of materials dealing with terrorism and terrorist activities which were seized to establish a possible motive for the robbery.

although the exact nature of the Taco Bell diagram (item (12)) may not have been ascertainable to the searching officers, it was definitely suspicious and its seizure was reasonably necessary in order to establish its evidentiary value.

It therefore appears that only some of the challenged items were introduced into evidence, and that those items were either validly seized pursuant to the warrant or were reasonably believed to have some connection to the crime being investigated. In addition, even if some of the items had been erroneously admitted, it would be impossible to conclude that such admission was prejudicial in view of the overwhelming evidence tying appellant to the commission of the robbery and the homicide.

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7. Trial counsel did not err in failing to object to the telephonic search warrant procedure used in the present case.

Appellant alleges that his trial counsel was incompetent for failing to object to the telephonic warrant procedure because such procedure was defective due to the magistrate's failure to personally sign the warrant prior to its execution. The contention is spurious.

In the present case, Detective Clark provided Judge Knox with an oral statement which the judge found sufficient to constitute probable cause to search. Detective Clark had prepared a written duplicate warrant which he read to Judge Knox. The judge approved the warrant and instructed Detective Clark to sign his (Knox's) name to the warrant. This duplicate

original warrant was in Officer Buckel's possession when he executed the search.

The procedure utilized here is specifically authorized by Penal Code sections 1526, subdivision (b) and 1528, subdivision (b). Appellant's reliance on Bowyer v. Superior Court (1974) 37 Cal.App.3d 151 is misplaced. Bowyer merely held that the officer/affiant must prepare a duplicate original warrant and that such warrant must be in existence at the time the magistrate authorizes the officer to affix his signature. (Id., at pp. 163-164 and fn. 11.) That requirement was clearly complied with in the present case. Accordingly, trial counsel was not incompetent for failing to object to the procedure.

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B. The prosecutor was not guilty of prejudicial misconduct in either his opening statement or his closing argument.

In his opening statement, the prosecutor told the jury, "The evidence in this case will show that Mr. Ramos and Mr. Gaitan premeditated and planned the execution of those two young people in the Taco Bell, with no doubt at all." Counsel for both defendants objected, contending that the prosecutor was arguing ultimate facts under the guise of an opening statement. The objection was overruled by the trial judge, who concluded that the prosecutor was "entitled to state his theory and how the evidence will fit the theory."

The purpose of an opening statement "is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality,

force and effect." (People v. Arnold (1926) 199 Cal. 471, 486; see also People v. Green (1956) 47 Cal.2d 209, 215.) It is difficult to conceive of how the prosecutor can accomplish this function if he is not entitled to state his theory of the case in terms of the requisite elements of the crime. But even were we to accept appellant's contention that there was a technical error here, it is inconceivable that such error resulted in prejudice to him. (See People v. Strickland (1974) 11 Cal. 3d 946, 955.)

Appellant also contends that the prosecutor committed misconduct during his closing argument by suggesting that appellant had the burden of raising a reasonable doubt as to his guilt. A review of the total statement in context reveals that this claim is

meritless. [8] The totality of the prosecutor's statement made clear what the proper standard was and how it was to be applied by the jury. Under the circumstances here, there was no prejudicial misconduct.

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8/ The prosecutor argued as follows:

"Now, the defense in this case has failed to raise a reasonable doubt, and I say that because after Mr. Pickrell has testified, and all of the other witnesses have testified, there is no question in this case but that the people in this case on trial are guilty of the crime.

"Reasonable doubt, which you will undoubtedly hear, is defined as follows: A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to a verdict of not guilty.

"This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt." (Emphasis added.)

C. The trial court's comments regarding possible jury verdicts did not constitute prejudicial misconduct.

Appellant claims that some of the trial court's comments during voir dire regarding possible jury verdicts were prejudicial and require a reversal of his conviction. On several occasions, the judge discussed the jury's obligation to decide between first and second degree murder in the event of a conviction, but did not mention the possibility of a manslaughter verdict or of a hung jury.

Appellant failed to object to the court's comments when made, however, and a challenge to allegedly improper remarks generally may not be raised for the first time on appeal, particularly when, as in this case, a timely objection may have obviated any problem by permitting the court to clear up any

misunderstanding that his comments may have elicited. (See, e.g., People v. Langdon (1959) 52 Cal.2d 425, 434; People v. Lanphear (1980) 26 Cal.3d 814, 836-837.) In any event, in view of the state of the evidence, we do not believe that there is any reasonable probability that the comments prejudiced the appellant.

D. Any errors in the admission of evidence at the guilt phase were not prejudicial.

1. Photos Taken Inside Taco Bell

Defendant claims that the trial court erred in admitting three photographs taken inside the Taco Bell after the crime. A picture of Kathryn Parrott's body was offered to show the position of the victims at the time of the shooting, supporting the prosecution's claim of an "execution-type" murder. A second picture of the body showed the position of the victims' hats, which appellant had allegedly asked them to remove. The third photograph revealed bloody fingerprints on a door jamb and was admitted to demonstrate appellant's movements during the commission of the crime. Appellant contends that the photographs were

irrelevant, cumulative and prejudicial and that they should not have been admitted.

The photographs at issue, disclosing and corroborating the manner in which the crime was committed, were clearly relevant to the issue of malice. (See People v. Jackson (1980) 28 Cal.3d 264, 302; People v. Frierson (1979) 25 Cal.3d 142, 171.) Under Evidence Code section 352, however, a trial court may exclude relevant evidence if the danger of prejudice created by the evidence outweighs the evidence's probative value. Appellant maintains that the trial court abused its discretion under section 352 in admitting the photos.

Our past cases make clear that a trial court's refusal to exclude otherwise admissible photographs under section 352 will not be disturbed on

appeal unless the prejudicial effect clearly outweighs the photos' probative value. (See People v. Pierce (1979) 24 Cal.3d 199, 211; People v. Murphy (1972) 8 Cal.3d 349, 363.) In the present case, the photos in question are not unduly gory or gruesome and the trial court could properly find that each of the photographs provided sufficiently significant corroboration of Pickrell's testimony to outweigh any potential prejudice. We note that the trial court excluded an additional photograph of Parrott's body taken at the scene of the killing after a police officer had turned her body over. We find no abuse of discretion in the challenged rulings.

2. Photo of Victim While Alive

Appellant next challenges the trial court's admission of a photograph of Kathryn Parrott taken while she was

still alive. The photograph was identified by Parrott's father in testimony before the jury.

When the prosecution offered this photograph into evidence, defense counsel objected to its admission as irrelevant and prejudicial. Counsel stated that defendant would stipulate that Kathryn Parrott was a human being and that she had been alive on June 2nd and was found dead on June 3rd. Given these stipulations, appellant maintained that the photograph was not relevant to any contested issue and suggested that the prosecution's only purpose in seeking to introduce the picture was "to humanize [Parrott] and make the jury feel sorry for her." After viewing the picture the trial court indicated that it could not see how the picture would

prejudice the defendant, and admitted the photo into evidence.

In our recent decision in People v. Hall (1980) 28 Cal.3d 143, 152, we noted that ordinarily "if a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence . . . to prove that element to the jury." In light of the defendant's stipulation in this case, the prosecutor cannot plausibly maintain that the introduction of the photograph was needed to demonstrate either that Parrott was a human being within the meaning of Penal Code section 187 or that she was alive prior to the events of the night in question.

Although neither party has directed our attention to any prior

criminal case in which the admissibility of a similar photograph of the decedent was in question, in O'Meara v. Haiden (1928) 204 Cal. 354, 366, our court addressed a comparable issue in the context of a wrongful death action. In O'Meara, as in this case, the photograph of a young decedent was identified by the decedent's parent before the jury and was introduced into evidence. In concluding that the admission of such evidence was erroneous, our court stated in O'Meara: "There was no dispute as to the identity of the boy injured. Just what was the purpose of offering in evidence his photograph is not apparent from the record, unless it was to unduly prejudice the jury in favor of the plaintiff. The reporter's transcript shows that the mother wept as she identified her son's picture. The

effect of such procedure cannot aid in the rendition of a just and fair verdict by the jury, which should be the purpose of all trials by jury. To permit the introduction of the dead boy's photograph under the circumstances shown in this action was undoubtedly error. . . ." (See also Armenta v. Churchill (1954) 42 Cal.2d 448, 459; cf. Westberg v. Willde (1939) 14 Cal.2d 360, 371.) Courts in other jurisdictions have reached similar conclusions when the proffered photograph has had no bearing on any contested issue in the case. (See generally Annot. (1960) 74 A.L.R.2d 928.)

By analogy to these past authorities, it appears that the trial court erred in admitting the photograph at issue. Under the facts of this case, however, it is clear that the error was not prejudicial. As we have seen, from

the evidence presented at the guilt phase this was not a "close case" in which the jury's sympathy for the victim may have led it to improperly convict appellant; the evidence of defendant's participation in the crimes was clear and uncontradicted. Accordingly, the admission of the photograph does not warrant reversal.

3. Testimony of Victim's Father

The victim's father testified at trial to conversations he had with his daughter about the possibility of a robbery occurring at work, stating that "she had said she wouldn't argue, wouldn't fight. . . ." Appellant objected to the introduction of this testimony on relevancy grounds, and now contends that the evidence should have

been excluded.[9/]

As the People suggest, the trial court could properly have found that the proffered testimony was relevant to the prosecution's claim that the murder in this case was a deliberate, premeditated murder and was not spontaneously precipitated by any resistance or aggressive conduct on the part of the victim. Evidence that Parrott had intended to offer no resistance to any robbery attempt would tend to show that she acted consistently with such pre-existing intent and would tend to corroborate Pickrell's testimony to that

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9/ Defendant failed to make any hearsay objection at trial, and consequently may not object to the evidence's admission on that ground on appeal. (See Evid. Code, § 353.)

effect. Accordingly, appellant's relevancy objection was properly overruled.

4. Evidence of Victims' Reactions During Robbery

At trial, Pickrell testified to a conversation the two employees had while they were held in the walk-in refrigerator during the robbery.[10/] Appellant objected to the admission of the testimony on relevancy and hearsay grounds, and he renews those objections on appeal.

Neither of the objections has merit. First, the conversation in question, in which the employees spoke

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10/ The key portion of the testimony in question is Pickrell's statement that: "Well, I told her that he was probably going to kill us because we knew him, and then she just said 'Well, pray to God.'"

of their fears during the robbery, was clearly relevant to the element of "force or fear" necessary for a robbery conviction. Second, appellant's hearsay objection founders on the "state of mind" exception to the hearsay rule embodied in Evidence Code section 1250. Under that provision, evidence is not made inadmissible by the hearsay rule when offered "to prove the declarant's state of mind, emotion, or physical sensation" at the time of the statement. In this case, the statements at issue clearly tended to prove the victims' fear during the commission of the crime, a "state of mind" which we have seen was directly at issue in the robbery charge.

Appellant also argues that the trial court committed prejudicial error in failing to instruct the jury that the testimony was not to be used to show the

truth of the matter asserted, allegedly leaving the impression that the confined employees had some basis in past experience with the appellant to believe he was capable of murder. The suggested inference, however, does not naturally follow from the statement in question. In any event, appellant fails to show that any possible error resulted in a miscarriage of justice. (See Cal. Const., art. VI, § 13; People v. Green (1980) 27 Cal.3d 1, 26.)

5. Testimony Regarding Disassembled Gun

In cross-examining codefendant Gaitan, who claimed on direct examination that he had not been present at the Taco Bell at the time of the robbery, the prosecutor asked whether he had noticed a gun in the apartment when he returned there in the early morning hours on the

date of the crime. Gaitan initially answered "Well, no," but then volunteered information about the presence of a disassembled gun in the closet of the apartment. Appellant did not move to strike the testimony and the prosecution did not pursue the issue.

As appellant suggests, evidence of possession of a weapon not used in the crime is ordinarily not admissible (see People v. Lo Cigno (1961) 193 Cal.App.2d 360, 379), and in this case the prosecution did not present evidence demonstrating that the disassembled gun might have been the weapon used in the robbery. The testimony concerning the disassembled gun was very brief, however, and in view of the strong uncontradicted evidence that the defendant had used a gun during the commission of the robbery, this evidence,

even if improperly solicited, was not prejudicial.

6. Admission of Gaitan's Employment Application

Appellant objects to the admission of an employment application of codefendant Gaitan which, along with four other handwriting exemplars, was introduced to prove that the food order found in the Taco Bell was written by Gaitan. The employment application was verified by the personnel director of the South Coast Plaza Hotel, who testified that Gaitan had worked at the hotel and that his employment application had been filled out when Gaitan came to the personnel office. The personnel director could not specifically recall, however, whether she had personally seen Gaitan fill out the application, and defendant now argues

that the trial court should have excluded the document for lack of a proper foundation.

Evidence Code section 1418 provides that "[t]he genuineness of writing . . . may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court."[11/] In this case, the personnel

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11/ Contrary to defendant's contention, the provisions of section 1271, governing the introduction of a document as an exception to the hearsay rule, are not applicable here because the document was not introduced to prove the truth of its contents, but simply as evidence of Gaitan's handwriting.

director's testimony established that Gaitan was personally present when the application on his behalf was filled out, and in the absence of any contrary indication we believe that the trial court could properly admit the document for use as a comparison handwriting exemplar. Moreover, it is clear in any event that the evidence was not prejudicial, because the handwriting on the Taco Bell order was additionally linked to Gaitan through the use of exemplars taken directly from Gaitan by one of the numerous handwriting experts who testified at trial.

7. Cumulative Effect

Finally, appellant asserts that even if none of the alleged errors was individually important enough to effect the outcome of the case, their

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cumulative effect was prejudicial requiring reversal of his conviction. (See, e.g., People v. Vindola (1979) 96 Cal.App.3d 370, 388; People v. Williams (1971) 22 Cal.App.3d 34, 45.) In this case, however, the evidence against appellant at the guilt phase was more than substantial, including most significantly the positive identification by the surviving victim. Even if all of the challenged evidence had been excluded, we do not think that the outcome of the guilt phase would have been affected. Therefore, any possible error did not result in a miscarriage of justice. (See Cal. Const., art. VI, § 13.)

E. Appellant was not prejudiced by any alleged instructional error in the guilt phase.

1. Obligation to Give Sua Sponte Accomplice Instructions

Appellant claims that the trial court erred in failing to instruct the jury sua sponte that an accomplice's testimony must be corroborated and should be viewed with distrust. He claims that the absence of such instructions was prejudicial because Gaitan gave damaging testimony concerning appellant's planning of the robbery.

Although in a proper case a trial court may be required to give sua sponte instructions to guide the jury in evaluating an accomplice's testimony (see, e.g., People v. Gordon (1973) 10 Cal.3d 460, 466-469), in People v. Terry (1970) 2 Cal.3d 362, 398-399, we explained that when, as here, a

codefendant testifies that he was not involved in the crime--and thus that he was not an accomplice--the trial court may properly conclude that the giving of accomplice instructions might improperly prejudice the codefendant's case. Terry indicates that in such a situation the giving or withholding of such instructions lie within the sound discretion of the trial court. In view of the fact that Pickrell's testimony obviously provided adequate corroboration of Gaitan's testimony against the appellant, we conclude that the trial court did not abuse its discretion in declining to give the accomplice instructions sua sponte in this case.

2. Instruction on Assault With a Deadly Weapon

Appellant claims that the trial court erred in failing to instruct

the jury sua sponte on the crime of assault with a deadly weapon. Whether or not assault with a deadly weapon is a lesser included offense when a defendant is charged both with robbery and a "use" allegation, a trial court, as we explained in People v. Flannel (1979) 25 Cal.3d 668, 683-686, is required to give such an instruction only if there is substantial evidence to support a jury's determination that the defendant was in fact only guilty of the lesser offense.

In this case, contrary to appellant's contention, there is no evidence from which the jury could reasonably conclude that defendant was only guilty of assault with a deadly weapon and not robbery. The evidence pointed unmista ably to the fact that appellant had taken money from the Taco Bell; appellant had presented no

evidence to suggest that he did not have the specific intent to steal. (Cf. People v. McGreen (1980) 107 Cal.App.3d 504, 512.) Under these circumstances, the trial court did not err in failing to instruct on assault with a deadly weapon.

3. Instructions on Circumstantial Evidence and Specific Intent

In addition to being convicted of the charged substantive crimes, defendant was found to have intentionally inflicted great bodily injury upon Pickrell, a finding which subjected appellant to a three-year enhancement of his punishment under Penal Code section 12022.7. Appellant contends that this enhancement finding should be reversed because the trial court did not specifically inform the jury that CALJIC No. 2.02 (1979 rev.), delineating the

conditions under which specific intent may be proved by circumstantial evidence, was applicable to the jury's determination of specific intent with respect to the enhancement. (See People v. Salas (1976) 58 Cal.App.3d 460.)

We think it clear that appellant suffered no prejudice from the trial court's omission. The jury in this case was generally instructed on the principles embodied in CALJIC No. 2.02 with respect to the substantive crimes, and the jury was also informed to consider all the instructions as a whole and to regard each in light of all the others. Under these circumstances, it is not reasonably probable that the jury was confused as to the proper use of circumstantial evidence in connection with the enhancement finding. (See

People v. Radil (1977) 76 Cal.App.3d 702, 707-709.)

4. Instructions on the Crime of Attempted Murder

Appellant was not only convicted of the murder of Kathryn Parrott, but also of the attempted murder of Kevin Pickrell. Instructing the jury on the latter offense, the court stated that "an attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime and a direct but ineffectual act towards its commission." It then instructed the jury that it could find defendant guilty of murder on any of three theories: express malice, implied malice, or felony murder. The court neglected, however, to inform the jury that the crime of attempted murder requires a specific intent to kill, a mental state

coincident with express malice but not necessarily with implied malice or felony murder. The jury instructions thus implied that the jury should find appellant guilty of attempted murder if it determined that appellant intentionally committed an act which, were the victim to die, would consitute [sic] murder on an implied malice or felony-murder theory. As we explained recently in People v. Murtishaw (1981) 29 Cal.3d 733, such instructions are inadequate.12/

12/ Murtishaw involves a conviction for assault with intent to commit murder, a crime virtually indistinguishable from attempted murder. Indeed, under legislation effective January 1 of last year (Stats. 1980, ch. 300, §§ 1-2) the separate crime of assault with intent to commit murder has been eliminated, so that all acts which formerly could have been prosecuted under that rubric are now prosecuted as attempted murders. Thus, Murtishaw's analysis of the jury instructions appropriate to the crime of assault with intent to commit murder applies with undiminished force to the present case.

The instant case also resembles Murtishaw, however, in that we are unable to accept appellant's contention that the instructional error complained of was prejudicial. Viewing as we must the record at the guilt phase independent of any evidence subsequently presented at the penalty phase,[13/] it is not reasonably probable that the jury would have returned a more favorable verdict in the absence of the instructional error. (See People v. Murtishaw, supra, 29 Cal.3d at p. 765.)

13/ The prosecution case at the guilt phase strongly indicated that appellant attempted to kill the two witnesses to the robbery. Intent was inferable from the circumstances of the crime. Since appellant presented no evidence at the guilt phase, there was no substantial basis from which the jury could conclude otherwise. All of the evidence suggesting that appellant may not have entertained an intent to kill was presented during the penalty phase.

F. Trial counsel did not render ineffective assistance in failing to present a diminished capacity defense at the guilt phase.

As previously noted, appellant's trial counsel elected to present no defense at the guilt phase and made no closing argument to the jury. Appellant asserts that he was denied effective assistance due to counsel's failure to adequately investigate, develop and present a diminished capacity defense. He points particularly to the fact that an important psychological test was not administered until the day before the administering psychologist testified at the penalty phase.[14/] The test results indicated

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14/ The Halsted-Reitan test was administered to appellant by Dr. John Haberland of the University of California at Irvine Medical Center on December 17, 1979.

that appellant suffered from mild congenital brain damage. Appellant argues that had this information been available prior to the guilt phase, it would have suggested a potentially meritorious diminished capacity defense.

In People v. Frierson (1979) 25 Cal.3d 142, 164, this court stated that "in a capital case, where diminished capacity appears to be the sole potentially meritorious defense, and counsel has in fact elected to present such a defense at trial, counsel must be expected to take those reasonable measures to investigate the factual framework underlying the defense preliminary to the exercise of an informed choice among the available tactical options, if any." (Emphasis in original.) Although appellant purports to rely on Frierson, the case is readily

distinguishable on its facts. As noted, defense counsel in Frierson elected to present a diminished capacity defense but decided to do so without the benefit of expert psychiatric witnesses. Appellant's counsel decided that a diminished capacity defense was inappropriate to the facts of this case. Therefore, it is the propriety of counsel's decision not to present the defense which must be evaluated.

Appellant's argument implies that the investigation which is a necessary predicate to such a decision either did not occur or occurred too late to be of value. The record fails to support such an implication. Psychiatric examination of appellant by a defense psychiatrist was authorized by the trial court over two months prior to commencement of the guilt phase.

Another defense psychiatrist conducted a series of seven examinations beginning September 19 and continuing through the first week of November. Numerous psychological tests were conducted during these examinations. On two occasions during October, appellant was transported from the Orange County Jail to the University of California Medical Center in Irvine for neurological examinations. Tests of an undisclosed nature were also conducted at St. Joseph's Hospital of Orange on October 24. On these facts, appellant is unable to sustain his burden of proving that trial counsel failed to adequately investigate the possibility of a psychiatric defense.

Moreover, trial counsel's decision not to present a diminished capacity defense cannot be said to have deprived appellant of effective

assistance. None of the psychiatric evidence accumulated by counsel either before or after the guilt phase suggested that appellant was incapable of forming the intent to steal. (See, e.g., People v. Frierson, supra, 25 Cal.3d at p. 155; People v. Mosher (1969) 1 Cal.3d 379, 391-393.) Since the prosecution's first degree murder case was presented to the jury on a felony-murder theory as well as a premeditation theory, additional evidence of diminished capacity would have been largely irrelevant. Counsel could have properly concluded that such psychiatric evidence as was available should be saved for the penalty phase in an effort to persuade the jury that appellant was an inappropriate candidate for the death penalty. Under these circumstances, we will not proceed to second-guess trial counsel's choice of

tactics. (See People v. Lanphear (1980) 26 Cal.3d 814, 828.)

G. There is substantial evidence to support the jury's findings that appellant personally used a firearm and that the murder was committed in the course of the robbery.

A review of the record indicates that appellant's sufficiency-of-the-evidence claims are spurious. (See generally People v. Johnson (1980) 26 Cal.3d 557.)

1. Appellant's Personal Use of a Firearm

Relying on People v. Walls (1978) 85 Cal.App.3d 447, appellant argues that the evidence is insufficient to sustain the jury in "reasonably rejecting" the possibility that the rifle changed hands and that codefendant Gaitan in fact used the weapon within the meaning of Penal Code section 12022.5. (See People v. Bassett (1968) 69 Cal.2d 122, 139.) Appellant contends

that since no one actually saw him shoot the victims, the jury could not properly find him guilty beyond a reasonable doubt.

Appellant's reliance on Walls is misplaced. That case involved a burglary-robbery-rape of two victims by two defendants where a firearm clearly changed hands on at least two occasions. The court concluded that under the circumstances there was insufficient evidence to conclude that one of the defendants had the firearm in his possession during the robbery of a specified victim. The instant case is clearly distinguishable since no evidence indicates that the rifle in question was ever in the possession of Ruben Gaitan. In addition, Gaitan apparently entered the walk-in refrigerator on only one occasion at the

beginning of the robbery whereas appellant entered and emerged numerous times. Accordingly, the evidence is manifestly sufficient to support the jury's finding that appellant personally used a firearm in the commission of the murder.

2. Murder in the Course of Robbery

Appellant's second claim is equally meritless. He begins by citing People v. Green (1980) 27 Cal.3d 1 for the proposition that "it [is] not enough for the jury to find the defendant guilty of a murder and one of the listed crimes; the statute also require[s] that the jury find the defendant committed the murder 'during the commission of or attempted commission of' that crime." (Id., at p. 59, emphasis in original.) From this

assumption he asserts that the robbery in this case was completed before the killing took place, and therefore that the murder was not perpetrated "in the commission of" a robbery within the meaning of Penal Code section 190.2, subdivision (a)(17).

It is well established that the crime of robbery continues beyond the point in time when the property is taken from the victim. (See People v. Laursen (1972) 8 Cal.3d 192, 199-200 and cases there cited.) In the instant case, the killing occurred at the same location as the robbery and within a short time after the money was taken from the safe. Moreover, the jury could well have concluded that the purpose of the killing was to eliminate a witness to the robbery. Under the circumstances, there is overwhelming evidence from

which a jury could find that the killing was perpetrated "in the commission of" a robbery.

H. Appellant was properly convicted of two counts of robbery.

Appellant was convicted in separate counts of the robbery of Parrott and the robbery of Pickrell; both robberies were enhanced by a finding that he used a firearm in the commission of the crime. Appellant argues that because there was but one taking of property, he can only be convicted of one robbery. The cases on which he relies suggest that, with respect to the other victim, the court should reduce the conviction to assault with a deadly weapon.

As a general rule, even though a defendant entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence

committed against a different victim. (See People v. Miller (1977) 18 Cal.3d 873, 885 and cases there cited.) Robbery is recognized as a crime of violence against the person. (See People v. Miller, supra, 18 Cal.3d 873, 880; People v. Guerin (1972) 22 Cal.App.3d 775, 781-782.) Thus when the defendants in People v. Childs (1980) 112 Cal.App.3d 374 took money at gunpoint from five bank tellers, they were convicted of five separate robberies. (Id., at pp. 382, 383.) The foregoing principles would indicate that appellant was properly convicted of the robberies of both Parrott and Pickrell.

Several Court of Appeal decisions, however, have held that the forceable taking of a single item of property from the joint possession of two victims constitutes only one

robbery. Arbitrarily selecting one of the victims as the robbery victim, those decisions reduce the offense against the other victim to the allegedly lesser included offense of assault with a deadly weapon.

In the first such case, People v. Guerin, supra, 22 Cal.App.3d 775, defendant was convicted of the robbery of two liquor store clerks and Simon, the store manager. Quickly affirming the conviction as to each clerk on the ground that each had separate dominion over his own cash register, the court balked as to Simon. "As manager," it observed, "he was in at least constructive possession of all the money in both registers. . . . But when the prosecution elected to charge Reifel and Miss Ward [the clerks] as additional victims of the takings, it

found itself in the position of charging two robberies for each taking. . . . [H]ad defendant been guilty only of theft, such a result could not have been permitted. We do not think that it can be permitted here." (Id., at p. 782.) The court then reduced the conviction as to Simon to assault with a deadly weapon, "an offense included within the crime of robbery in the first degree." (Id., at pp. 782-783.)

In the next case, People v. Higgins (1972) 28 Cal.App.3d 771, defendants at gunpoint compelled two clerks to remove money from the same cash register. The same panel of the Court of Appeal as had decided Guerin relied on that case in holding that defendants could have been convicted of robbing either clerk, but not both; it

then reduced the offense as to one clerk to assault with a deadly weapon.

In both Guerin and Higgins, the defendants were convicted of first degree robbery. The use of a deadly weapon was an essential element of first degree robbery, a fact upon which the court relied in finding assault with a deadly weapon was a lesser included offense. The 1976 Legislature, however, amended section 211a to eliminate the degrees of robbery, which raised anew the question of lesser included offenses. In People v. McGreen, supra, 107 Cal.App.3d 504, the Court of Appeal addressed that issue, and held that a charge of robbery plus an allegation that defendant used a firearm in the commission of the robbery encompassed the lesser offense of assault with a deadly weapon.

Finally, People v. Childs, supra, 112 Cal.App.3d 374, applied the McGreen analysis to a case of multiple robbery convictions. In Childs, as we noted earlier, defendants committed separate robberies of each of the bank tellers. On leaving the bank, defendants accosted a pickup truck, ordered the driver (Negoli) and the passenger (Lazar) out of the vehicle, and fled in the truck. The court stated the "both victims were in possession of the same vehicle and were victims of a single taking. Therefore, the additional count charging [defendant] for robbery of Negoli must be modified in light of the robbery conviction sustained against Lazar. Since both Negoli and Lazar were victims of an assault, the conviction on Count III (robbery of Negoli) must be modified to

assault with a deadly weapon pursuant to Guerin." (Id., at p. 383.)

It is clear that each of the two subsequent cases (Higgins and Childs) relied heavily on the Guerin court's reasoning in concluding that a single taking from two victims constitutes but one robbery. We find that reasoning suspect.

Guerin explicitly recognized that Penal Code section 654's prohibition of multiple punishment for a single criminal act did not bar conviction and punishment for two courts of robbery when the multiple victims were involved. (22 Cal.App.3d at p. 780.) Without actually acknowledging what it was doing, the Guerin court in effect chose

to read the robbery statute (Pen. Code, § 211)[15/] to require multiple takings in order to sustain multiple convictions. We do not read the legislative intent so narrowly. Robbery is not merely the felonious taking of personal property. Such a taking, without more, is only theft. To constitute robbery the property must be removed from the possession and immediate presence of the victim against his will, and such removal must be by force or fear. When two or more persons are in joint possession of a single item of personal property, the person attempting to unlawfully take such property must deal with all such

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15/ Section 211 provides as follows: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

individuals. All must be placed in fear or forced to unwillingly give up possession. To the extent that any threat may provoke resistance, and thus increase the possibility of actual physical injury, a threat accompanied by a taking of property from two victims' possession is even more likely to provoke resistance.

We view the central element of the crime of robbery as the force or fear applied to the individual victim in order to deprive him of his property. Accordingly, if force or fear is applied to two victims in joint possession of property, two convictions of robbery are proper.[16/]

16/ To the extent they are inconsistent with this opinion, Guerin, Higgins and Childs are hereby disapproved.

I. The instant case is an inappropriate vehicle for re-examination of the felony-murder rule.

Relying on the recent decision of the Michigan Supreme Court in People v. Aaron (Mich. 1980) 299 N.W.2d 304, appellant invites us to re-examine the underpinnings of the felony-murder rule in California. For the time being, however, we choose to decline the invitation since the facts of the instant case make it an inappropriate vehicle for such a re-examination. The record in the guilt and penalty phases strongly suggests that the jury viewed the killing in this case as intentional and malicious. It is thus unlikely that the giving of the felony-murder instruction worked to appellant's detriment.

We therefore rely on extensive and well-settled precedent in affirming

appellant's first degree murder conviction under circumstances where a felony-murder theory was presented to the jury. (See, e.g., People v. Burton (1971) 6 Cal. 3d 375, 388; People v. Lindley (1945) 26 Cal.2d 780, 791; People v. Doyell (1874) 48 Cal. 85, 94-95.) We do not suggest that a re-examination of such precedent may not be appropriate under other circumstances.[17/]

17/ Appellant also contends that the 1978 death penalty law is unconstitutional because it allows for the imposition of capital punishment without a determination that the defendant intended the death of the victim where the first degree murder conviction is based on a felony-murder theory. In view of our conclusion that the penalty determination must be reversed due to the unconstitutionality of the Briggs Instruction, we need not express an opinion on this additional contention.

III. PENALTY PHASE ISSUES

The 1978 Death Penalty

Initiative added the fifth paragraph of section 190.3 to the Penal Code. It provides: "The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without possibility of parole may in the future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California." The statute requires that this instruction, popularly known as the Briggs Instruction, be given at the penalty phase of every special circumstance case conducted pursuant to the 1978 law.

In the instant case the court instructed the jury in the language of the second paragraph of CALJIC No. 8.84.2, which implements the statute: "You are

instructed that under the State Constitution, a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime. Under this power, a Governor may in the future commute or modify a sentence of life without possibility of parole to a lesser sentence that would include the possibility of parole."

We shall point out, after examining the background of the Briggs Instruction and the history of similar statutorily compelled instructions, that the Briggs Instruction cannot withstand constitutional analysis. In the first place, it invites considerations that are foreign to the jury's task of determining whether the defendant should live or die. Instead of assuring that the jury's life-or-death decision rests on "consideration of the character and

record of the individual offender and the circumstances of the particular offense" (Woodson v. North Carolina (1976) 428 U.S. 280, 304; Lockett v. Ohio (1978) 438 U.S. 586, 603-608), the instruction focuses the attention of the jury on the fact that the Governor has the power to render the defendant eligible for parole if the jury does not vote to execute him. The jury's induced consideration of this possibility leads it into an area where it has no guidelines and in which its conclusion must be entirely speculative. In this realm, the jury's life-or-death sentencing decision may be based at least in part on the jurors' perception of the present or some future governor's philosophy or possible action, rather than on the defendant's crime, his character and his record. The challenged instruction thus improperly leads the

jury far beyond the constitutional safeguards of due process of law.

The instruction suffers from a second and perhaps deeper constitutional flaw. Although it tells the jury that a sentence of life without possibility of parole may in the future be modified by the Governor to permit parole, it neglects to tell the jury that a sentence of death may likewise be modified by the Governor to permit parole. The jurors are thus misled into believing that if they vote for life without possibility of parole the Governor may still commute or grant parole, but not told the same powers reside with the Governor if they vote the death penalty. The jury is left with the mistaken belief, because of this omission, that the only sure way to keep the defendant off the streets is to condemn him to death.

A. The Briggs Instruction violates the Constitution by inviting the jury to consider an extraneous and speculative factor in deciding whether or not to impose the death penalty.

The Briggs Instruction appears to be unique among the 38 states which have capital punishment statutes currently in effect.[18/] The impropriety of the statute, however, becomes clear from a review of the numerous decisions which have condemned comparable instructions or prosecutorial comment advising or permitting the jury to consider the possibility of pardon or parole in deciding what sentence is to be imposed upon the convicted defendant.

18/ The Massachusetts death penalty law, recently declared unconstitutional on independent state grounds in District Atty. for Suffolk Dist. v. Watson (Mass. 1980) 411 N.E.2d 1274, also did not contain any mandated instruction similar to the Briggs Instruction.

Almost 20 years ago, in People v. Morse (1964) 60 Cal.2d 631, this court held prejudicially erroneous an instruction that told the jury that in deciding whether or not to impose the death sentence upon a convicted defendant it should consider the possibility that the Governor might commute the sentence or that the prison authorities might eventually grant defendant parole.

Prior to Morse, trial courts in California were permitted to instruct jurors about the possibilities of pardon or parole in order to "afford [to the jury] the pertinent facts 'to assist it in assessing the significance of a life sentence.' [Citations.]" (Id., at p. 637.) The Morse jury was similarly instructed: "'In making your determination as to the penalty to be imposed, you may, in exercising your discretion

to choose between different punishments, consider as a possible consequence that the law of this state provides a defendant sentenced either to death or life imprisonment may be pardoned or have his sentence reduced by the Governor and that if this defendant is sentenced to life imprisonment he may be eligible for parole at the expiration of seven calendar years. A trial judge may also reduce the penalty from death to life imprisonment.' (CALJIC No. 306 (rev.).)" (Id., at p. 636.)

We addressed two separate issues in Morse. As to instructions regarding the possibility of parole, we noted that "[t]he objective situation is difficult enough without blurring the functions. The function of the jury is to consider the facts surrounding the crime and the defendant's background,

and upon that basis, reach its decision. The jury should not be invited to decide if the defendant will be fit for release in the future; it should not at all be involved in the issue of the time, if any, when the defendant should be released; . . . The vice of placing such issues before the jury . . . in substance, transposes the task of the Adult Authority to the jury." (Id., at p. 643.) The opinion recognized the state interest in assuring that jurors do not engage in erroneous speculation based on incorrect preconceptions; it held that the jury could be informed as to the general operation of the parole procedure, but then should be specifically instructed not to speculate as to what the Adult Authority might do. (Id., at p. 648.)

We secondly considered the effect of instructions which informed

the jury of the Governor's power to commute the death sentence and the trial court's power to reduce a death sentence to a sentence of life imprisonment, concluding that "[b]oth statements tend to diminish the jury's sense of obligation; they both infuse into the issue factors which do not belong there. . . . [W]e believe that [such] instructions . . . tend to mislead the jury into assuming that the rendition of the penalty initiates a chain of proceedings by the court and the Governor which will achieve a reweighing of the sentence and possibly produce its nullification." (Id., at pp. 652-653.) The opinion held that such instructions should not be given, but that the jury should be informed as to the "general scheme of our parole system" and carefully cautioned that "the matter of parole is not to be considered by you"

and particularly that "[I]t would be a violation of your duty as jurors if you were to fix the penalty of death because of a doubt that the Adult Authority will properly carry out its responsibilities."

The Morse case exemplifies the multitude of decisions in this country which condemn comments by a judge or prosecutor regarding the possibility of pardon or parole since such allusions introduce irrelevant factors into the jury's consideration of the sentencing issue. "The prevailing view in this country, with which we agree, is that a jury charged with the responsibility of assessing the penalty to be suffered by the accused should not be invited, by instruction or argument, to speculate on the possible effect of pardon or parole upon the execution of the sentence imposed." (State v. Atkinson (S.C.1970)

172 S.E.2d 111, 112; see also State v. Lindsey (W. Va. 1977) 233 S.E.2d 734, 736-738.)

Although some early cases found such error to be nonprejudicial (e.g., Grandsinger v. State (Neb. 1955) 73 N.W.2d 632, 651; McMann v. State (Fla. 1951) 55 So.2d 538, 539-540), the general current rule holds that jury consideration of such possibilities works automatic prejudice. (E.g., State v. Lindsey (La. 1981) 404 So.2d 466, 484-488; Bush v. State (Ark. 1977) 550 S.W.2d 175, 177; Sukle v. People (Colo. 1941) 111 P.2d 233, 235; see also Lovely v. United States (4th Cir. 1948) 169 F.2d 386, 391.) In some jurisdictions, mere mention of the possibility of pardon or parole constitutes grounds for reversal. (E.g., Hinton v. Commonwealth (Va. 1978) 247 S.E.2d 704, 706.) In others, jurors

may be generally informed of the possibility of pardon, but then must be specifically instructed not to consider it in reaching their verdict. (E.g., State v. White (N.J. 1958) 142 A.2d 65, 76-77; Commonwealth v. Aljoe (Pa. 1966) 216 A.2d 50, 55.)

The courts of Virginia and West Virginia have vividly pointed out the vice of misleading a jury into the belief that it must sentence a defendant to death in order to avoid the possibility that otherwise a coordinate branch of government might reduce the sentence and permit the defendant to go at large. In Jones v. Commonwealth (Va. 1952) 72 S.E. 2d 693, the jury requested assurance from the judge that if they sentenced defendant to life imprisonment, he would not "get out." "The court told the jury that 'it could not give that assurance; that would

be in the hands of the executive branch of government and that the court was of the judicial branch; that you and I represent the judicial branch and have nothing to do with that.'" (Id., at p. 694.) In reality, defendants sentenced to life imprisonment were ineligible for parole; the only way a defendant so sentenced could "get out" would be a pardon by the Governor. The majority of the Virginia Supreme Court recognized that the comment by the trial judge misled the jury because it suggested that defendants sentenced to life imprisonment might be eligible for parole. (Id., at p. 696.) The court reversed the sentence of death imposed by the jury, relying upon the proposition that the trial court should never inform the jury that a lawfully imposed sentence may be reduced by a coordinate branch of government.

The West Virginia Supreme Court of Appeals in State v. Lindsey, supra, 233 S.E.2d 734 reached a similar result. There, the jury was instructed that if it recommended mercy, defendant would be "'entitled to parole under the applicable statute of the State of West Virginia.'" (Id., at p. 738; emphasis in original.) The court noted that a convicted defendant "is never entitled to parole. [Citations.] He is eligible to be considered for parole." (Id., at p. 739.) The opinion continues: "The jury is the trier of facts and 'there is no presumption that they are familiar with the law.' [Citation.] . . . We cannot presume that the jury knows the law and the instruction given to it, being extremely misleading , doubtless induced that jury to convict without a mercy recommendation. . . . We must conclude that such instruc-

tion, being inaccurate, misleading and incomplete, operated to the detriment of the defendant and constituted reversible error." (Id.; see also State v. Tudor (Ohio 1950) 95 N.E.2d 385, 391 (dis. opn. of Hart, J.); State v. Brooks (S.C. 1978) 247 S.E.2d 436, 438-439.)

Thus the Virginia and West Virginia courts condemn the above instructions because they suggest that the jury's sentence may be nullified by another branch of government; thus the instructions blur the constitutional lines that separate the judicial from the executive powers of the state. The Supreme Court of Kentucky has likewise held that instructions that lead the jury to consider the possibility of executive pardon or parole violate the constitutional principle of the separation of powers.[19/]

19/ In Broyles v. Commonwealth

In similar vein Tennessee and Louisiana supreme courts conclude that such procedure impairs the constitutional

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Footnote 19 continued:

(Ky. 1954) 267 S.W.2d 73, 76-77, the court stated: "Under our theory of separation of governmental powers, it is the duty of the judiciary to obtain a conviction of those guilty of crime. But once that conviction has been obtained and the sentence imposed, it is the duty of other departments of government to enforce the sentence and to determine when and under what circumstances the prisoner will be eligible for release. . . . [Thus,] the parole of prisoners falls within another department of government, and a discussion of the subject has no place in an argument to a jury." In State v. Lindsey, supra, (La.) 404 So.2d at p. 487, the court said, "The jury could conclude that the governor will improperly pardon dangerous offenders or commute their sentences, thereby encouraging it to pre-empt the governor's power and defeat the constitutional design by opting for the death penalty."

right of defendant to a fair trial.[20/]

We recognize that Morse itself did not invoke these constitutional principles and relied primarily upon this court's power to supervise lower courts. As we explain, however, the United States Supreme Court's recent death penalty decisions make it clear that in the context of capital sentencing, the flaws exposed by Morse effect a constitutional dimension.

The United States Supreme Court has now established that in capital cases the Eighth Amendment requires that the decision whether a defendant is to

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20/ The Tennessee Supreme Court in Farris v. State (Tenn. 1976) 535 S.W.2d 608, 614 suggested that "[j]urors should not be permitted to speculate on the length of sentences, discretionary parole, . . . and a whole conglomeration of events which, if they come to pass at all, will come to pass in the future. Very heavily involved is the constitutional right of a defendant to a fair trial."

live or die must be based upon "consideration of the character and record of the individual offender and the circumstances of the particular offense." (Woodson v. North Carolina, supra, 428 U.S. at p. 304; Lockett v. Ohio, supra, 438 U.S. at pp. 603-608.)

Quite clearly, the Briggs Instruction does not direct the sentencing jury's attention to any of these constitutionally-relevant considerations. Instead, it injects into the sentencing calculus an entirely irrelevant factor, the possibility of a gubernatorial commutation or pardon, that bears no relationship to the character or record of the individual offender or to the circumstances of the particular offense. Moreover, the jury's consideration of this factor must necessarily be entirely speculative, for the jury obviously

cannot determine at the penalty trial whether the present or some future governor will or will not commute a particular sentence imposed on the defendant. Thus, the effect of the Briggs Instruction may be to lead the jury to base its life-or-death decision at least in part on a speculative prediction of possible future gubernatorial action, rather than on the defendant's crime, his character and his record.

As we have seen, even in non-capital cases the vast majority of American jurisdictions preclude a jury from considering the gubernatorial pardon power in determining an appropriate criminal sentence. In a capital case, this general principle rises to a constitutional predicate. As the United States Supreme Court has explained:

"Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (Woodson v. North Carolina, supra, 428 U.S. at p. 305.)

The Briggs Instruction, by injecting an irrelevant and speculative consideration into the penalty determination, diverts the jury's attention from the central issue and thereby "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth

and Fourteenth Amendments." (Lockett v. Ohio, supra, 438 U.S. at p. 605. See also Beck v. Alabama (1980) 447 U.S. 625, 638, 642.)

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B. Since the Briggs Instruction is partial, incomplete and misleading it induces the jury to apply the death penalty improperly and in violation of the Constitution.

In addition to confusing the jury with irrelevant information, the Briggs Instruction misleads the jurors by telling them only half the story.[21/] They are informed that if a sentence of life

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21/ Not only is the instruction a half-truth in the practical sense, but were it part of a contractual negotiation, it would arguably constitute a tortious deceit and a fraudulent misrepresentation. Civil Code section 1710, subdivision 3 defines a deceit as "[t]he suppression of a fact, by one . . . who gives information of other facts which are likely to mislead for want of communication of that fact. . . . " (See also Civ. Code, § 1572, subd. 3; Rest. 2d Torts, § 529.) While the considerations which govern private conduct as opposed to governmental conduct are admittedly different in many cases, we would condone an anomaly if we were to uphold this instruction and in essence authorize state-sanctioned fraud and deceit in the most serious of all state actions: the taking of a human life. (See Gardner v. Florida, supra, 430 U.S. at p. 358.)

without possibility of parole is imposed, that sentence may in the future be commuted or modified by the Governor to a lesser sentence which includes the possibility of parole. The jury is not informed that a sentence of death may be similarly commuted or modified. The implication which results from this omission is clear: a sentence of life without possibility of parole does not mean incarceration for life; it may be commuted or modified. Thus the only way to be sure that the defendant is never again let loose upon society to repeat his vicious crime is to impose a sentence of death.

The danger of the Briggs Instruction, and the misleading inferences which may be drawn from it, finds ample illustration in the facts of the instant case. The instruction enabled the

prosecutor to argue to the jury as follows: "When the death penalty was voted in there were certain considerations that the jurors were going to be asked to take into account and to weigh them, and if the scale went one way it was appropriate for the death penalty and if it goes the other way then it's appropriate for life without parole, which does not quite mean that, and we'll get to that when we describe the instructions." (Emphasis added.)

The instruction also encouraged the prosecutor to elicit some particularly prejudicial testimony on cross-examination from Dr. Sheffner, the defense psychiatrist. The prosecutor first asked the doctor whether the appellant was aware of the possibility of parole by way of a gubernatorial commutation, were he to receive a sentence of life

imprisonment. The doctor replied that appellant was aware of the possibility, although he viewed the chances as rather remote. The prosecutor then inquired as to the defendant's state of mind were he to be released on parole after 10 or 20 years in prison. The doctor testified that defendant answered that he would probably have built up within himself such feelings of anger and frustration that he would attempt to take revenge on anyone involved in the trial, including the district attorney who prosecuted the case, the judge who presided over it, and the jurors who voted to convict him.[22/] Thus, the jurors in this case

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22/ This testimony was marginally relevant to explain the basis of Dr. Sheffner's conclusion that appellant had congenital brain damage evidenced by primitive and illogical thinking. The Attorney General also asserts that the testimony was independently relevant as bearing on appellant's state of mind at

were not only misled in the abstract; they were given a very personal motive to insure that defendant was never

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Footnote 22 continued:

the time of the crime and on his character in general. Even relevant evidence, however, may be excluded by the trial court "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice. . . ." (Evid. Code, § 352.)

A trial court ruling admitting evidence under section 352 may be reviewed only to determine whether the court abused its discretion. (See People v. Kelley (1977) 75 Cal.App.3d 672, 678.) Although courts have rarely found an abuse of discretion, our opinion is that the present case constitutes one of those rare exceptions. The probative value of the testimony was insignificant; Dr. Sheffner had other grounds for his diagnosis, and could cite other examples of defendant's "primitive thinking." And even if marginally relevant on independent grounds, its prejudicial effect was substantial, particularly when considered in connection with the jury instruction on the Governor's commutation power. Weighing the danger of prejudice against the probative value, we conclude that the testimony should not be admitted if the penalty phase is retried.

released. And the Briggs Instruction through its misleading implication suggested that the only way to attain this "permanent" result was a sentence of death.[23/]

Decisions of the United States Supreme Court hold that procedures biased in favor of the death penalty cannot withstand constitutional challenge; the Briggs Instruction results in the scales of justice being "tipped toward death." In Witherspoon v. Illinois (1968) 391 U.S. 510, the court stated that "[o]ne of [the basic requirements of procedural

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23/ In Morse, we quoted one commentator whose observation is equally pertinent to the instant case: "'[T]he fact that a person sentenced to life might be released before he may safely be returned to society indicates a weakness in the parole system--not that he ought to have been executed.' (Knowlton, Problems of Jury Discretion in Capital Cases (1953) 101 U.Pa.L.Rev. 1099, 1119.)"
(60 Cal.2d at p. 644, fn. 10.)

fairness] is that the decision whether a man deserves to die must be made on scales that are not deliberately tipped toward death." (Id., at pp. 521-522, fn. 20.) The court concluded: "The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law." (Id., at p. 523.)

A death penalty that rests upon considerations or information improperly received by the trial court denies to defendant due process of law. Thus, in Gardner v. Florida, supra, 430 U.S. 349 the Supreme Court was confronted with a death penalty case in which the trial judge stated that he relied in part on information in a presentence investigation report, including confidential information which was not

disclosed to counsel for the parties. The court pointed out the two factors that led to its reversal of the judgment: "First, it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. [¶] Second, it is not clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."

Holding that the record must disclose to the reviewing court the considerations which motivated the death sentence, the court held, "Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia."

This deliberation by the trial judge based upon considerations improperly introduced vitiated the judgment because it violated the guarantees of due process of law.

Although the information denied to the defendant in Gardner was concededly relevant and presumptively reliable (430 U.S. at p. 359), we deal in the instant case with information which is concededly irrelevant and clearly unreliable. Basing the finding of death upon such irrelevant and unreliable considerations the Briggs Instruction biases the jury in favor of death and "stacks the deck" against defendant. To uphold a death sentence predicated on this type of procedure would violate Witherspoon, vitiate Gardner, and make a mockery of defendant's protection of due process of law.

In an attempted answer to these

solid objections to the Briggs Instruction the People urge that the instruction neither leads to misunderstanding nor works any effect at all. The People point out that the jury does not enjoy an unlimited discretion in determining whether to impose death or life without possibility of parole, but are instructed to "consider . . . the applicable aggravating and mitigating circumstances, to weigh them and to reach a decision based on such findings." The People therefore would dismiss as in "no way a factor" the specific instruction that the "governor is empowered to grant a reprieve, pardon or commutation" and that "under this power, a Governor may in the future commute or modify a sentence of life in prison without possibility of parole to a lesser sentence." The People go so far as to assert that the jury "was

impliedly told not to consider" this instruction as to the Governor's power, and that the instruction as to aggravating and mitigating circumstances somehow obliterates the instructions as to the Governor's powers.

Yet the offending instruction is the penultimate instruction in a lengthy exposition of mitigating and aggravating factors, and strongly remains in the minds of the jurors in deciding upon death or parole. The jurors are informed at this crucial point that the only way to keep the offender off the streets is to liquidate him. Yet, says the People, the jurors do not "consider this factor in reaching their decision"! The People would apparently erase this last and potent thrust toward the penalty of death on the grounds that the jurors are instructed to consider

other instructions in addition to the Briggs Instruction and that, in any event, the jurors may already be aware of the Governor's commutation power.

In short, the People argue that the Briggs Instruction serves merely to tell the jurors what they already know, and has little, if any, effect on their deliberation and decision. We question the premises on which this argument rests; we do not believe that jurors are generally aware of the scope of the Governor's commutation power, or that the jury instructions on aggravation and mitigation will necessarily nullify the harm done by the Briggs Instruction. Indeed, the People's argument is belied by the history of the Briggs Instruction: surely, the draftsmen would not have taken the extraordinary step of commanding trial courts to give a specific

instruction if they believed the instruction would have no significant effect whatsoever on the verdict.

We therefore hold that the Briggs Instruction constitutes a dual violations of defendant's due process rights as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.[24/] By encouraging the jury to consider an irrelevant and confusing factor in their deliberations, the instruction reduces the reliability of any resulting sentencing determination. This vice is compounded by the practical effect of the instruction in biasing the jury in favor of the death penalty by suggesting --totally incorrectly--that the only way

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24/ Whether or not the Briggs Instruction also independently violates one or more provisions of the California Constitution is an issue we need not decide.

that the jury can ensure that the convicted defendant will not be released from custody through the Governor's commutation power is by imposing a sentence of death.

Although the dissent perceives no harm to the defendant from the incomplete and misleading Briggs Instruction, we find it unquestionably prejudicial. A juror who is faced with a choice of a verdict of life without possibility of parole or of death and who is troubled by the fortuity that the defendant may be released by a commutation or pardon granted by the Governor, is told by the judge that such release can indeed occur if the juror selects life without possibility of parole. Under the Briggs Instruction, however, the judge does not tell the juror that such release can also occur if the juror selects a sentence

of death. Thus, a juror who is concerned about the effects of a possible commutation or pardon could reasonably, but erroneously, conclude from the Briggs Instruction that the only way to prevent such a commutation or pardon is to return a verdict of death. Thus, the instruction through a deception may lead a juror to vote for death although the juror believes that the verdict should be lifetime confinement in prison. In short, the instruction erroneously, deceptively and unconstitutionally tilts the verdict toward death.

Finally, the dissent contends that a ruling of this court that the death penalty not be inflicted unless constitutionally rendered would impose too great a burden upon the judicial system. To do so might cause a number of decisions to be reversed. But the

Briggs Instruction affects only penalty trials, not trials determining a defendant's guilt, and the guilt trials entail the greatest expenditure of time and money. In any event, conjectures as to the burden of retrials are speculative; we do not know what instructions were given in these cases and we do not know whether the instructions as actually rendered were proper.

Surely, if the State of California exacts the death penalty, it has no license to take a human life based upon an improper and unconstitutional verdict of death A human life cannot be balanced against the costs to the state of conducting a fair trial. If the state is to execute an individual, it must not do so on the basis of a verdict of death tainted by a misleading, deceptive,

unconstitutional instruction, but upon a proceeding that clearly complies with due process of law.

The judgment is reversed insofar as it relates to penalty. In all other respects the judgment is affirmed.

*TOBRINER, J.

WE CONCUR:

BIRD, C.J.
MOSK, J.
NEWMAN, J.
KAUS, J.
BROUSSARD, J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council

C O P Y

PEOPLE v. RAMOS

Crim. 21352

CONCURRING AND DISSENTING OPINION BY RICHARDSON, J.

I concur in the majority opinion to the extent that it affirms defendant's conviction of first degree murder, attempted murder and robbery. I respectfully dissent, however, from the majority's reversal as to penalty.

Under the 1978 death penalty law, the trial courts are required to inform the jury at the penalty phase that a sentence of life imprisonment without possiblity of parole subsequently may be commuted or modified by the Governor. The majority concedes that this instruction correctly states the

law. It finds, however, that the instruction violates defendant's due process rights. This holding will require the reversal of every death sentence heretofore imposed in those jury trials which have been conducted under the 1978 law, assuming, as we must, that the trial court followed the mandate of that law and gave the requisite instruction. Scores of capital cases will face retrial. (Approximately 90 judgments of death have been filed with this court subsequent to the enactment of the 1978 law at issue here.) I respectfully suggest that only if a constitutional defect clearly and unmistakably appears should we require such a colossal reexpenditure of judicial resources. No such defect is involved here.

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As we recently observed, the death penalty laws, as with all legislation, are presumed constitutional and will be upheld unless their invalidity "clearly, positively and unmistakably" appears. (People v. Jackson (1980) 28 Cal.3d 264, 317; see In re Dennis M. (1969) 70 Cal.2d 444, 453.) In similar fashion, in appraising the constitutionality of initiative measures such as the 1978 death penalty law, we should resolve all doubts in favor of the use of the initiative process if we can reasonably do so. (Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 248.) Significantly, the majority cites no cases whatever which suggest that it would be unconstitutional to instruct the jurors in a capital case regarding the Governor's commutation power.

Indeed, as discussed below, most cases acknowledge the self-evident fact that the Governor's authority to commute or reduce a criminal sentence is a matter of common knowledge. That being so, the giving of the challenged instruction must be considered harmless and non-prejudicial.

The majority first criticizes the instruction on the basis that it induces the jury to "speculate" regarding irrelevant penalty factors. (Ante, p. __[maj. opn., at p. 62.) To the contrary, the instruction is purely informational, explaining to those jurors who might otherwise be misled that a sentence denominated "life imprisonment without possibility of parole" is nonetheless subject to possible commutation by the Governor. (See Summers v. State (Nev. 1970) 467

P.2d 98, 100, approving a similar informational instruction.) Clearly, the instruction does not advise or encourage the jury to reach its verdict in reliance upon this information. Indeed, the jury is separately instructed regarding the sole and limited factors which are to be considered and weighed in determining the proper penalty; the Governor's commutation power is not included among these factors. (See Pen. Code, § 190.3, subds. (a)-(k).)

Moreover, even if the instruction did advise the jury to consider the commutation power in making its determination, on what proper basis could such an instruction be deemed unconstitutional? It is true that some prior cases have suggested that the consideration of the possibility of subsequent

administrative grants of parole raises an extrinsic factor which might confuse the jury or diminish its sense of responsibility. (E.g., People v. Morse (1964) 60 Cal.2d 631, 643, 652-653.) Yet unlike the situation in those cases, here the issue of parole is necessarily presented to the jurors by the very language of the alternative punishment being considered by them, namely, "life without possibility of parole." (Pen. Code, § 190.) Moreover, Morse involved no statute which mandated the giving of such instruction, and its holding appears to rest not on constitutional grounds but upon this court's inherent power to supervise the lower courts in the absence of contrary legislation. Surely, the people of this state, who are the ultimate sovereign, in adopting legislation of this kind by initiative, are entitled to disagree with

and override our view of the relevance of information which might be of concern to the jurors in a capital case.

The majority suggests, however, that the instruction mandated by the 1978 law is incomplete in its failure to advise the jury that the Governor may commute a sentence of death as well as a sentence of life without possibility of parole. It is difficult to understand how or why a defendant would ever desire such an instruction, which could only lead the jurors to minimize the seriousness and severity of the death penalty as a choice of punishment. Indeed, in Morse, supra, we expressly disapproved a similar instruction, on the basis that it "may very well induce the jury to assume that its finding for the death penalty merely initiates a series of procedures which invoke a reconsideration of the

penalty and which may result in its reduction to life imprisonment. [¶] . . . The impact of the instruction must necessarily weaken the jury's own sense of responsibility." (60 Cal.2d at p. 649, italics added.)

Incredibly, the majority now invalidates the 1978 death penalty law for its failure to require an instruction of a type condemned by us in Morse. Such a capricious conclusion makes no sense.

The majority insists, however, that the challenged instruction tells the jurors only "half the story," implying thereby that a death sentence is "the only way to be sure that the defendant is never again let loose upon society to repeat his vicious crime." (Ante, p. __ [maj. opn., at pp. 62-63].) Assuming for purposes of argument that some jurors may exist who base their penalty decision

upon such factors, it is highly unlikely that any such jurors would choose the lesser penalty upon being advised of the Governor's power to commute a death sentence. Thus, from the defendant's standpoint, no tactical reason whatever exists for requesting an instruction on that issue.

Finally, as many of the cases make clear, it is likely that most jurors already know of the Governor's commutation power. Several courts have recognized that the availability of parole and commutation in capital cases is readily understood among lay persons. (See State v. Carroll (Wyo. 1937) 69 P.2d 542, 560; State v. Cherry (N.C. 1979) 257 S.E.2d 551, 561; Grandsinger v. State (Neb. 1955) 73 N.W.2d 632, 651, cert. den. 352 U.S. 880; Paramore v. State (Fla. 1969) 229 So.2d 855, 860; Sullivan

v. State (Ariz. 1936) 55 P.2d 312, 318-319.) Cherry involved juror discussion and consideration of the possibility of subsequent parole by administrative bodies. The North Carolina Supreme Court noted "We see little prejudice to defendant since the possibility of parole or executive clemency is a matter of common knowledge among most adult persons." (P. 561, italics added.) The same conclusion was expressed more forcibly by the Nebraska Supreme Court in Grandsinger, another capital case, wherein the court observed that the prosecutor's comments regarding the availability of pardon or parole "was simply a statement of existing . . . law which all men, including the jurors, were presumed to know and doubtless did already know about before the statement was made." (P. 651.) The Grandsinger

court concluded that "It would be a perversion of truth and justice" to hold that the prosecutor's comments required reversal of the death penalty rendered in that case. (Ibid.)

In the present case, the majority's reversal of the judgment as to penalty is similarly improper, resting as it does upon a highly unlikely chain of speculation that some jurors were (1) previously unaware of the full extent of the Governor's commutation powers and (2) chose the death penalty only after learning that the Governor may commute a sentence of life imprisonment without possibility of parole. Given the jurors' probable prior knowledge, such a circumstance, in my view, would be highly unlikely.

In sum, the people of this state by adopting the 1978 death penalty

initiative have determined that, although probably widely known, the jurors in capital cases nonetheless should be informed of the Governor's power to commute a sentence of life imprisonment without possibility of parole. The majority's contrary views as to the wisdom of such an instruction afford no basis for declaring the law, established by the people's initiative, unconstitutional.

I would affirm the judgment in its entirety.

RICHARDSON, J.

PEOPLE v. RAMOS

Crim. 21352

COUNSEL FOR THE PARTIES:

For Appelant: [sic]

Alan M. Caplan
Busnell, Caplan, Fielding & Rudy
Wharfside Building
680 Beach Street, No. 365
San Francisco, Calif. 94109

(415) 563-4390

For Respondent:

Harley D. Mayfield
Deputy Attorney General
110 West Street, No. 600
San Diego, California

(714) 236-7759

TRIAL COURT: Orange County Superior Court

TRIAL COURT NO. No. #-42382

NAME OF JUDGE: Honorable R. J. Beacom

APPENDIX B

Order Due

February 24, 1982

ORDER DENYING REHEARING

CRIM. NO. 21352

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

MARCELINO RAMOS

Opinion modified.

Respondent's petition for rehearing DENIED.

Request for stay of issuance of remittitur DENIED.

Richardson, J., is of the opinion that the petition for rehearing should be granted.

Chief Justice

APPENDIX C

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCELINO RAMOS,

Defendant and Appellant.

_____/

Crim. 21352

Super. Ct. C-42382

MODIFICATION OF OPINION

The opinion in this case is modified by deleting the words "statutorily compelled" from page 52, lines 22 and 23.

APPENDIX D

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

/

/

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unites States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

/

CALIFORNIA CONSTITUTION

ARTICLE V

SECTION EIGHT

Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it. The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring. [As amended November 5, 1974.]

Sec. 9. [Repealed November 8, 1966. See Section 9, below.]

/

CALIFORNIA STATUTES

California Administrative Code

Title 15. § 2817

Board Referral to Governor.

(a) Persons Considered. Prisoners serving sentences of life imprisonment without possibility of parole who have suffered no more than one felony conviction shall be considered by the board for possible referral to the Governor.

(b) Scheduling. The case of each prisoner serving a sentence of life without the possibility of parole shall be reviewed twelve years after reception and every third year thereafter.

(c) Panel. The hearing shall be conducted by a panel as designated by the chairman.

(d) Information Considered. The hearing panel shall consider the information specified in §§ 2232-2238 and the summary prepared by department staff.

(e) Prisoner Rights. At this hearing the prisoner shall have the rights specified in §§ 2245-2255. The record shall be a written summary or a tape recording.

(f) Decision. The hearing panel shall determine whether the prisoner should be considered for commutation of sentence and for pardon. If the decision is to recommend commutation or pardon, department staff shall forward the record of the hearing and the panel's recommendation and reasons to the chairman, to the attention of the executive officer, for review.

(g) Review by Chairman. The chairman will review the case and

either disagree with or concur in the panel's recommendation. If the chairman disagrees the prisoner shall be informed in writing of the decision and the reasons. If the chairman concurs in the panel's recommendation, the case will be presented to the board at its next regularly scheduled clemency calendar.

PENAL CODE

§ 190

Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.

§ 190.3

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of

Section 1672 of the Military and Veterans Code or Sections 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use

force or violence and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evid-

ence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(K) Any other circumtance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating cir-

cumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

§ 4800

The Board of Prison Terms may report to the Governor from time to time the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause which, in their opinion, should entitle the prisoner to a pardon or commutation of sentence.

Joint Appendix

—

Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1893

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,

PETITIONER,

v.

MARCELINO RAMOS,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

JOINT APPENDIX

GEORGE DEUKMEJIAN, Attorney General
ROBERT PHILIBOSIAN, Chief Assistant
Attorney General--Criminal Division
DANIEL KREMER, Assistant Attorney General
JAY M. BLOOM, Deputy Attorney General
HARLEY D. MAYFIELD, Deputy Attorney General
110 West "A" Street, Suite 700
San Diego, California 92101
Telephone: (714) 237-7759
Attorneys for Petitioner

EZRA HENDON, Deputy State Public Defender
1390 Market Street, Suite 365
San Francisco, California 94102
Telephone: (415) 557-0125
Attorney for Respondent

PETITION FOR CERTIORARI FILED APRIL 13, 1982
CERTIORARI GRANTED OCTOBER 4, 1982

JOINT APPENDIX

	Pages
Chronological List of Dates on Which Pleadings Filed, Hearings Held, and Orders Entered	JA 1 - 4
Information	JA 5 - 11
Motion to Modify Jury Instruction	JA 12 - 22
Relevant Material From Reporter's Transcript	JA 23 - 40
Ruling on Motion to Modify Instruction	JA 23
Excerpt from Deputy District Attorney's Cross Examination of Defense Witness	JA 24 - 25
Excerpts from Deputy District Attorney's Argument at Penalty Phase	JA 26 - 28
Excerpt from Defense Counsel's Argument at Penalty Phase	JA 29 - 32
Instructions at Penalty Phase	JA 33 - 40
Note Regarding the Judgment of the California Supreme Court	JA 41

CHRONOLOGICAL LIST OF DATES
ON WHICH PLEADINGS FILED,
HEARINGS HELD, AND ORDERS
ENTERED
(Superior Court Docket
Sheets not in record)

SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF ORANGE

People v. Marcelino Ramos, et al.
No. C-42382

Date	Proceedings
7-10-79	Information filed.
7-19-79	Ramos pleads not guilty to all counts and denies special allegations.
9-14-79	Motion to dismiss special allegation of murder for financial gain granted.
10-5-79	Demurrer to special allegation that murder was especially heinous, atrocious or cruel granted. Language at page 2. line 19,

Date	Proceedings
10-5-79 (cont.)	through page 3, line 5 stricken from information.
11-26-79	Jury trial commenced.
12-6-79	Ramos found guilty of Counts I through IV. Special circumstance and all other special allegations found true. Murder in Count III and attempted murder in Count IV fixed at first degree.
12-11-79	Defense motion to strike paragraph two of CALJIC 8.84.2 denied.
12-12-79	Penalty phase commenced.
12-19-79	Jury returned verdict of death.
1-25-80	Motion for new trial and motion to modify

Date	Proceedings
1-25-80 (cont.)	verdict of death denied. Ramos sentenced to death for murder in Count III. Sentences of imprisonment on other counts imposed and stayed.

SUPREME COURT OF THE STATE CALIFORNIA

People v. Marcelino Ramos
Crim. 21352
(Superior Court C-42382)

4-29-81	On April 29, 1981, the California Supreme Court made public a letter addressed to counsel and all other interested parties inquiring as to whether the Court had authority to stay the giving of the commutation in-

Date	Proceedings
4-29-81 (cont.)	struction in trial courts throughout California pending decision in this case.
1-25-82	Judgment reversed insofar as it relates to penalty. In all other respects, judgment affirmed.

Filed in open Superior Court of the State of California, in and for the County of Orange, on motion of the District Attorney of said Orange County, this 10th day of July 1979

LEE A. BRANCH, COUNTY CLERK

BY: Joan McBride Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA)
)
Plaintiff)
)
vs.)
)
MARCELINO RAMOS AKA)
MARCELINO YABARRA)
RUBEN GAITAN AKA)
FRANKIE GAITAN)
)
Defendant)

NO. C- 42382

I N F O R M A T I O N

COUNT I: The District Attorney of the County of Orange, by this Information, hereby accuses MARCELINO RAMOS AKA MARCELINO YABARRA AND RUBEN GAITAN AKA FRANKIE GAITAN of a FELONY, to-wit:

Viclation of Section 211 of the Penal Code of the State of California, (ROBBERY), in that on or about the 3rd day of June, 1979, in the County of Orange, State of California, the said MARCELINO RAMOS AKA MARCELINO YABARRA and RUBEN GAITAN AKA FRANKIE GAITAN did willfully, unlawfully and feloniously and by means of force and fear take the personal property from the person, possession and immediate presence of Kathryn Agusta Parrott.

COUNT II: And the said MARCELINO RAMOS AKA MARCELINO YABARRA and RUBEN GAITAN AKA FRANKIE GAITAN are hereby accused by this second count of this Information, of a FELONY, to-wit: Violation of Section 211 of the Penal Code of the State of California, (ROBBERY), in that on or about the 3rd day of June, 1979, in the County of Orange, State of California, the said MARCELINO RAMOS AKA

MARCELINO YABARRA and RUBEN GAITAN AKA FRANKIE GAITAN did willfully, unlawfully and feloniously and by means of force and fear take the personal property from the person, possession and immediate presence of Kevin Lavell Pickrell.

COUNT III: And the said MARCELINO RAMOS AKA MARCELINO YABARRA and RUBEN GAITAN AKA FRANKIE GAITAN are hereby accused by the District Attorney of the County of Orange, by this third count of this Information, of a FELONY, to-wit: Violation of Section 187 of the Penal Code of the State of California, (MURDER), in that on or about the 3rd day of June, 1979, in the County of Orange, State of California, the said MARCELINO RAMOS AKA MARCELINO YABARRA and RUBEN GAITAN AKA FRANKIE GAITAN did willfully, unlawfully and feloniously and with malice aforethought, kill Kathryn Agusta Parrott, a human being.

COUNT IV: And the said MARCELINO RAMOS AKA MARCELINO YABARRA and RUBEN GAITAN AKA FRANKIE GAITAN are hereby accused by the District Attorney of the County of Orange, by this fourth count of this Information, of a FELONY, to-wit: Violation of Section 664/187 (ATTEMPT MURDER), in that on or about the 3rd day of June, 1979, in the County of Orange, State of California, the said MARCELINO RAMOS AKA MARCELINO YABARRA and RUBEN GAITAN AKA FRANKIE GAITAN did willfully, unlawfully and feloniously and with malice aforethought, attempt to kill Kevin Lavell Pickrell, a human being. (Portions stricken by Superior Court deleted.)

It is further alleged that the murder of Kathryn Agusta Parrott, a human being was committed by defendant MARCELINO RAMOS AKA MARCELINO YABARRA while said defendant was engaged in the

commission of and attempted commission of and in the immediate flight after committing the crime of robbery in violation of Penal Code section 211, within the meaning of Penal Code Section 190.2 (a)(17)(i).

It is further alleged that the murder of Kathryn Agusta Parrott, a human being, was committed while defendant RUBEN GAITAN AKA FRANKIE GAITAN was engaged in and was an accomplice in the commission of and the attempted commission of and in the immediate flight after committing the crime of robbery in violation of Penal Code Section 211, within the meaning of Penal Code Section 190.2 (a)(17)(i) and Penal Code Section 190.2(b).

If is further alleged that in the commission and attempted commission of the above offenses in Counts I-IV, the said defendant MARCELINO RAMOS AKA

MARCELINO YABARRA personally used a fire-arm, to-wit: a rifle, within the meaning of Penal Code Section 12022.5.

It is further alleged that in the commission and attempted commission of the above offenses in Counts I-IV, the def-endant RUBEN GAITAN AKA FRANKIE GAITAN, personally used a deadly and dangerous weapon, to-wit: an ax, said use not being an element of the above offenses, within the meaning of Penal Code Section 12022(b).

It is further alleged that in the commission of the above offense, COUNT II, the said defendant, MARCELINO RAMOS AKA MARCELINO YABARRA, with the intent to inflict such injury, inflicted great bodily injury upon Kevin Lavell Pickrell, not an accomplice to the above offense, within the meaning of Penal Code Section 12022.7.

Contrary to the form, force and effect of the Statute in such cases made

and provided, and against the peace and dignity of the People of the State of California.

DATED: July 10, 1979

CECIL HICKS, District Attorney
COUNTY OF ORANGE,
STATE OF CALIFORNIA

By: Paul S. Meyer
Deputy District Attorney

[Clerk's Transcript pp. 143-145]

Frank L. Williams, Jr.
Public Defender
Orange County
Dennis McNerney
Deputy Public Defender
700 Civic Center Drive West
Santa Ana, California

Telephone: 834-2144

Attorneys for Defendant

Filed Dec 20 1979
Lee A. Branch, County Clerk
By _____ Deputy

SUPERIOR COURT OF THE STATE
OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
MARCELINO RAMOS,
Defendant.

Case No. C-42382

MOTION TO MODIFY JURY
INSTRUCTION

Defendant moves this Court to strike the second paragraph from CALJIC #8.42.2.

I

THE SECOND PARAGRAPH OF CALJIC #8.84.2 DENIES DEFENDANT DUE PROCESS OF LAW.

The crucial part of CALJIC #8.42.2 is based on P.C. §190.3 and reads as follows:

> "You are instructed that under the State Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modicy a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole."

This allows, in fact invites, the jury to engage in impermissible speculation as to possible future conduct of the Governor, Legislature and Community Release Board.

The California Supreme Court resolved this problem in the case of People v. Morse (1964) 60 C2d 631. The Court said that the penalty jury's task

was hard enough when based just on the facts it learned. It should not be made harder by introducing speculation.

> "The objective situation is difficult enough without blurring the functions. The function of the jury is to consider the facts surrounding the crime and defendant's background, and upon that basis, reach its decision. The jury should not be invited to decide if the defendant will be fit for release in the future; it should not at all be involved in the issue of the time, if any, when the defendant should be released; it should not be propelled into weighing the possible consequences of the Authority's administrative action.
>
> "The vice of placing such issues before the jury reaches deeper than the promulgation of confusion; it frames questions that no human mind can answer, and it, in substance, transposes the task of the Adult Authority to the jury.

"The questions are unanswerable because they rest upon future events which are unpredictable. The jury's attention may be focused, as it was here, upon whether the Authority will release the defendant into society at some uncertain date in the future, such as 'eight, nine, ten years from now'.

"Based upon what defendant may then be, the jury is asked whether it thinks defendant should at that time be released to society. Premised upon the unknown, the question asks for an answer that cannot be intelligently rendered. The jury is precipitated into a judgment upon the imponderable." Morse, pp. 643-4.

"The final and most dangerous error of permitting the jury to consider the Authority's possible grant of parole is to induce it to pass judgment upon the very issue foreclosed to it and to prevent the proper body from deciding the issue at the proper time. The jury can conclude that the Authority will improperly

> grant defendant parole in the future; it may fear that the Adult Authority will permit a 'dangerous' defendant to walk the streets; it may then foreclose the authority from ever granting parole by imposing the death penalty. The jury would thus improperly pre-empt the whole parole system and defeat the legislative design. The jury would then utilize the death penalty for fear that the Adult Authority will not properly perform the function that the Legislature has specifically delegated to it." Id, 664.

The fact that this decision was rendered when the old death penalty statute was in effect in no way vitiates its rationale. CALJIC 8.84.2 paragraph 2 promotes just the evil condemned in Morse.

The Morse court went on to note that jurors often speculate on the possibility of parole. They formulated a jury instruction which recognized the

fact of parole and then instructed the jurors to disregard that possibility in their deliberations. CALJIC 8.84.2 tells the jurors not to disregard it and thus insidiously suggests that they vote for death lest the defendant some day get out.

After Morse the California Supreme Court went on to condemn the practice of a district attorney asking the jury to kill a defendant because he might escape some day.

> "The People's closing argument erroneously invited the jury to speculate from that evidence as to the possibility that in the future prison officials might be ineffective in the discharge of their duties and permit defendant to escape. Thus the jury were diverted from their duty and responsibility of selecting the penalty in violation of the principle underlying our holding in People v. Morse, 60 Cal. 2d 631, 643 [36 Cal.Rptr. 201,

388 P.2d 33, 12 A.L.R. 3d 810]. (In re Pike, 66 Cal. 2d 170, 172-173 [57 Cal. Rptr. 172, 424 P.2d 724].) People v. White (1968) 69 Cd 751, 762."

Neither Texas nor Florida, whose death statutes have been upheld by the U.S. Supreme Court (and thus might be considered "enlightened") have a charge to the jury similar to CALJIC 8.84.2. In fact, case law in both states is similar to Morse.

Clinton v. State (Texas 1975) 528 S.W. 2d 250 said that the jury may not apply the parole law in assessing punishment because it causes prejudice by urging an excessive penalty. See also Sullivan v. State (Texas 1978) 564 S.W. 2d 698.

In Florida the case of Burnett v. State 157 So. 2d 65 (1963) is controlling. It holds that a jury may not be advised of or concerned with the state

parole laws in the penalty trial. The rationale is that a defendant has a right to be tried and sentenced in a fair proceeding free from prejudiced or inflammatory statements.

II

THE SECOND PARAGRAPH OF 8.84.2 IS IRRELEVANT TO THE ISSUE OF PENALTY AND ITS ONLY PURPOSE IS TO ENCOURAGE THE JURY TO VOTE FOR DEATH.

A defendant in a penalty phase has a right to be tried for what he did in the past, what he was in the past and what he is at the time of trial. That is supposedly why the legislature set down a list of aggravating and mitigating factors and commended that the jury weigh them and render their verdict based on the weight of such factors alone. (See Penal Code §190.3 and Paragraph 4 of CALJIC 8.84.2.)

Jurors, being human, cannot be expected to refrain from some degree of speculation about what chance there is of a person getting paroled in the future. It is not, however, the province of the legislature or courts to sub rosa urge such speculation on them; particularly when Morse, supra makes it improper and when the very statute that encourages it also makes it irrelevant.

Telling the jury that life without parole doesn't mean life without parole is redundant if the last paragraph of PC § 190.3 and paragraph 4 of CALJIC 8.84.2 mean what they say. The paragraphs mandate a verdict based on the weight of a given type of evidence (present aggravation/mitigation). If the jury follows that procedure literally there is absolutely no reason to tell them anything about the possible consequences of their verdict since con-

sequence is not included in the type of enumerated evidence they are constrained to consider.

The statute says if aggravation "outweighs" mitigation the jury "shall impose a sentence of death." If mitigation "outweighs" aggravation the jury "shall impose a sentence of confinement in the state prison for life without the possibility of parole." Based on this mandatory charge to the jury, what possible relevance can there be in telling the jury anything about what could happen after sentencing?

A logical reading of P.C. § 190.3 and CALJIC 8.84.2 makes clear just what a cynical pro-death charge to the jury this second paragraph is. Case law, common sense and due process require that the paragraph be stricken from any instruction resembling CALJIC 8.84.2

Dated:

Respectfully submitted,

FRANK L. WILLIAMS, Jr.
PUBLIC DEFENDER

Dennis McNerney
Deputy Public Defender

[Clerk's Transcript pp. 665-671]

RELEVANT MATERIAL FROM
REPORTER'S TRANSCRIPT

Ruling on Motion to Modify Instruction

[THE COURT]: YOUR MOTION ON 8.84.2 REGARDING INSTRUCTING THE JURY THAT THE GOVERNOR CAN COMMUTE OR PARDON, MY THINKING IS IT'S EXPRESSLY PROVIDED FOR BY LEGISLATION ENACTED SINCE PEOPLE VERSUS MORSE AND CASES FOLLOWING, AND THAT IT'S THE LEGISLATIVE MANDATE OF THE STATE. I PLAN TO GIVE IT.

ANY FURTHER COMMENT ON THAT?

MR. MC NERNEY: NO.

THE COURT: YOUR MOTION TO STRIKE THAT PORTION REFERRING TO THE GOVERNOR'S POWER TO REPRIEVE, PARDON OR COMMUTE A SENTENCE IS DENIED.

[Reporter's Transcript Volume XI
p. 718 lines 15-24]

Excerpt from Deputy District Attorney's Cross Examination of Defense Witness.

[DEPUTY DISTRICT ATTORNEY MEYER TO DEFENSE WITNESS]:

Q NOW, HAVE YOU HAD ANY DISCUSSIONS WITH MR. RAMOS WITH RESPECT TO HIS FEELINGS ABOUT HAVING GOTTEN CAUGHT IN THIS INCIDENT AND WHAT HE WOULD DO AND WHAT HE LOOKED AHEAD TO?

A YES.

Q I MEAN IN PARTICULAR WITH RESPECT TO REVENGE. HAVE YOU HAD DISCUSSIONS WITH HIM IN THAT REGARD?

A YES.

Q WOULD YOU DESCRIBE THOSE FOR THE JURY, PLEASE? WELL, LET ME ASK YOU THIS IN ADVANCE: WAS, IN YOUR ESTIMATE, MR. RAMOS AWARE THAT IN A SITUATION OF LIFE WITHOUT PAROLE THE GOVERNOR WOULD BE ABLE TO COMMUTE THE SENTENCE TO LIFE AND THAT THAT WOULD ENVISION PAROLE?

A HE'S AWARE OF THAT POSSIBILITY.

I DON'T THINK HE SEES IT AS ESPECIALLY VIABLE FOR HIM, BUT, YES, HE IS AWARE OF THAT.

Q WAS IT PARTLY IN THAT SETTING THAT HE DESCRIBED OR YOU HAD THE DISCUSSION WITH HIM WITH RESPECT TO HIS FEELINGS OR REVENGE?

A HE BROUGHT IT UP.

[Reporter's Transcript Volume XII, p. 1051 line 24 through p. 1052 line 17]

Excerpts from Deputy District Attorney's Argument at Penalty Phase

[DEPUTY DISTRICT ATTORNEY MEYER]:

THE QUESTION IN THIS CASE AS TO WHETHER THE DEATH PENALTY IS APPROPRIATE AND APPLIES IS A RESULT OF THE WEIGHING OF CONSIDERATIONS BY THE JURORS.

WHEN THE DEATH PENALTY WAS VOTED IN THERE WERE CERTAIN CONSIDERATIONS THAT THE JURORS WERE GOING TO BE ASKED TO TAKE INTO ACCOUNT AND TO WEIGH THEM, AND IF THE SCALE WENT ONE WAY IT WAS APPROPRIATE FOR THE DEATH PENALTY AND IF IT GOES THE OTHER WAY THEN IT'S APPROPRIATE FOR LIFE WITHOUT PAROLE, WHICH DOES NOT QUITE MEAN THAT, AND WE'LL GET TO THAT WHEN WE DESCRIBE THE INSTRUCTIONS.

THIS PARTICULAR MURDER CASE FITS THE DEATH PENALTY CRITERIA AND THE

/

PURPOSE FOR THE DEATH PENALTY.

[Reporter's Transcript Volume XII
p. 1098 lines 9-20]

[DEPUTY DISTRICT ATTORNEY MEYER]:

AND, THE JUDGE TELLS YOU SOMETHING, WHICH THE DOCTOR HAS ALREADY INDICATED MR. RAMOS IS AWARE.

"YOU ARE INSTRUCTED THAT UNDER THE STATE CONSTITUTION OUR GOVERNOR IS EMPOWERED TO GRANT A REPRIEVE, PARDON OR COMMUTATION AFTER SENTENCE FOLLOWING CONVICTION OF A CRIME.

"UNDER THIS POWER A GOVERNOR MAY IN THE FUTURE COMMUTE OR MODIFY A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE TO A LESSER SENTENCE THAT WOULD INCLUDE THE POSSIBILITY OF PAROLE.

"AFTER HAVING HEARD ALL OF THE EVIDENCE AND AFTER HAVING HEARD AND CONSIDERED THE ARGUMENTS OF COUNSEL, YOU SHALL CONSIDER, TAKE INTO

ACCOUNT AND BE GUIDED
BY THE APPLICABLE FAC-
TORS OF AGGRAVATING AND
MITIGATING CIRCUMSTANCES
UPON WHICH YOU HAVE BEEN
INSTRUCTED."

[Reporter's Transcript Volume XII
p. 1110 line 22 through
p. 1111 line 14]

Excerpt from Defense Counsel's Argument at Penalty Phase

[DEFENSE COUNSEL MR. MCNERNEY]:

WE HAVE PRISONS IN THIS STATE. WE HAVE ONE OF THE MOST ADVANCED PENAL SYSTEMS IN THE WORLD IN THE STATE OF CALIFORNIA.

THERE ARE PEOPLE IN PRISON THAT HAVE COMMITTED CRIMES FAR MORE HORRIBLE THAN MARCELINO RAMOS.

CHARLES MANSON IS IN THE STATE PENAL SYSTEM. SIRHAN SIRHAN IS IN THE STATE PENAL SYSTEM.

IT IS NOT NECESSARY TO KILL MARCELINO RAMOS TO PROTECT SOCIETY.

YOU KNOW, SIRHAN AND CHARLES MANSON ARE ELIGIBLE FOR PAROLE. THEY HAVE ALREADY BEEN TO THE PAROLE BOARD. OF COURSE, THEY HAVE BEEN REFUSED PAROLE. BUT AT LEAST THEY ARE ELIGIBLE TO GO TALK TO THOSE PEOPLE EVERY YEAR OR SO AND MAKE PETITIONS, AND THEY HAVE

A LEGAL RIGHT TO GO BEFORE THE BOARD AND THE BOARD HAS TO CONSIDER THEM.

LIFE WITHOUT PAROLE MEANS LIFE WITHOUT POSSIBILITY OF PAROLE. YOU DON'T HAVE A LEGAL RIGHT TO GO TO THE PAROLE BOARD.

RUBEN GAITAN WILL HAVE A RIGHT TO GO TO THE PAROLE BOARD IN 15 YEARS.

MR. MEYER: I OBJECT TO THAT, YOUR HONOR. I OBJECT. I'LL APPROACH THE BENCH IF THE COURT WISHES.

THE COURT: OBJECTION IS OVERRULED. PLEASE PROCEED.

MR. MCNERNEY: MARCELINO RAMOS WILL NEVER HAVE A RIGHT TO GO TO THE PAROLE BOARD UNLESS THE GOVERNOR OF THE STATE OF CALIFORNIA, WHOEVER HE MAY BE SOME DAY, MIGHT SAY, WELL, I'M GOING TO MODIFY HIS SENTENCE FOR SOME REASON, PARDON HIM FOR SOME REASON.

THE GOVERNOR HAS A LEGAL RIGHT TO MODIFY OR PARDON ANYONE CONVICTED OF A CRIME.

WHY WOULD HE DO THAT IN THIS CASE? GOVERNOR BROWN HAS NEVER PARDONED ANYONE. HIS FATHER PARDONED ONE KILLER DURING THE YEARS THAT HE WAS GOVERNOR, AND THAT WAS BECAUSE THEY FOUND OUT THE MAN WAS INNOCENT.

MR. MEYER: YOUR HONOR, I OBJECT TO THIS.

MR. MCNERNEY: THAT IS THE ONLY REASON.

THE COURT: OVERRULED. PLEASE PROCEED.

MR. MCNERNEY: OUR PRISON SYSTEM IS A GOOD PRISON SYSTEM; AND IF YOU BELIEVE IN THE HEREAFTER, YOU MUST BELIEVE THAT SOME DAY YOU'LL HAVE TO STAND BEFORE THE CREATOR ON JUDGMENT DAY AND ANSWER FOR YOUR LIFE.

/

AND IF YOU ARE ASKED, "WHY DID YOU KILL MARCELINO RAMOS?" WILL YOU BE ABLE TO SAY, "BECAUSE I HAD TO." THAT'S REALLY THE ONLY ANSWER THAT WILL FLY.

YOU ARE NOT DECIDING BETWEEN KILLING MARCELINO RAMOS AND LETTING HIM GO. YOU ARE NOT DECIDING BETWEEN DEATH AND FREEDOM.

YOU ARE DECIDING BETWEEN TWO TERRIBLE PUNISHMENTS, ONE OF WHICH HAPPENS TO BE MORE TERRIBLE THAN THE OTHER.

[Reporter's Transcript Volume XII
p. 1161 line 2 through
p. 1162 line 25]

Instructions at Penalty Phase

THE COURT: LADIES AND GENTLEMAN, IN THIS CASE THE DEFENDANT HAS BEEN FOUND GUILTY OF MURDER OF THE FIRST DEGREE.

THE CHARGE THAT MURDER WAS COMMITTED UNDER A SPECIAL CIRCUMSTANCE ESPECIALLY FOUND TO BE TRUE.

IT IS THE LAW OF THIS STATE THAT THE PENALTY FOR A DEFENDANT FOUND GUILTY OF MURDER IN THE FIRST DEGREE SHALL BE DEATH OR CONFINEMENT IN THE STATE PRISON FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE IN ANY CASE IN WHICH THE SPECIAL CIRCUMSTANCE CHARGED IN THIS CASE IS ESPECIALLY FOUND TO BE TRUE.

UNDER THE LAW OF THIS STATE YOU MUST NOW DETERMINE WHICH OF THE SAID PENALTIES SHALL BE IMPOSED ON DEFENDANT.

THE FACT THAT A WITNESS HAS BEEN CONVICTED OF A FELONY, IF SUCH BE A FACT, MAY BE CONSIDERED BY YOU ONLY FOR THE PURPOSE OF DETERMINING THE

CREDIBILITY OF THAT WITNESS. I SHOULD INDICATE TO YOU THAT THIS INSTRUCTION APPLIES SPECIFICALLY TO THE TESTIMONY OF MR. LAM.

THE FACT OF SUCH A CONVICTION DOES NOT NECESSARILY DESTROY OR IMPAIR THE WITNESS' CREDIBILITY. IT IS ONE OF THE CIRCUMSTANCES THAT YOU MAY TAKE INTO CONSIDERATION IN WEIGHING THE TESTIMONY OF SUCH A WITNESS.

IN DETERMINING WHICH PENALTY IS TO BE IMPOSED ON DEFENDANT, YOU SHALL CONSIDER ALL OF THE EVIDENCE AND ALL OF THE APPLICABLE INSTRUCTIONS ON THE LAW WHICH HAVE BEEN RECEIVED DURING ANY PART OF THE TRIAL OF THIS CASE, EXCEPT AS YOU MAY HEREAFTER BE INSTRUCTED.

YOU SHALL CONSIDER, TAKE INTO ACCOUNT AND BE GUIDED BY THE FOLLOWING FACTORS, IF APPLICABLE:

A, THE CIRCUMSTANCES OF THE CRIME OF WHICH THE DEFENDANT WAS CON-

VICTED IN THE PRESENT PROCEEDING AND THE EXISTENCE OF ANY SPECIAL CIRCUMSTANCE FOUND TO BE TRUE;

B, THE PRESENCE OR ABSENCE OF CRIMINAL ACTIVITY BY THE DEFENDANT WHICH INVOLVED THE USE OR ATTEMPTED USE OF FORCE OR VIOLENCE OR THE EXPRESS OR IMPLIED THREAT TO USE FORCE OR VIOLENCE;

C, THE PRESENCE OR ABSENCE OF ANY PRIOR FELONY CONVICTION;

D, WHETHER OR NOT THE OFFENSE WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE;

E, WHETHER OR NOT THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S HOMICIDAL CONDUCT OR CONSENTED TO THE HOMICIDAL ACT;

F, WHETHER OR NOT THE OFFENSE WAS COMMITTED UNDER CIRCUMSTANCES WHICH THE DEFENDANT REASONABLY BELIEVED TO BE A MORAL JUSTIFICATION OR EXTENUATION FOR

HIS CONDUCT;

G, WHETHER OR NOT THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER SUBSTANTIAL DOMINATION OF ANOTHER PERSON;

H, WHETHER OR NOT AT THE TIME OF THE OFFENSE THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS IMPAIRED AS A RESULT OF MENTAL DISEASE OR DEFECT OR THE EFFECTS OF INTOXICATION;

I, THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME;

J, WHETHER OR NOT THE DEFENDANT WAS AN ACCOMPLICE TO THE OFFENSE AND HIS PARTICIPATION IN THE COMMISSION OF THE OFFENSE WAS RELATIVELY MINOR;

K, ANY OTHER CIRCUMSTANCES WHICH EXTENUATE THE GRAVITY OF THE CRIME EVEN THOUGH IT IS NOT A LEGAL EXCUSE FOR THE CRIME.

/

IN WEIGHING THE AGGRAVATING AND MITIGATING FACTORS, YOU ARE NOT TO MERELY COUNT NUMBERS ON EITHER SIDE.

YOU ARE INSTRUCTED RATHER TO WEIGH AND CONSIDER THE FACTORS ON EACH SIDE AS A WHOLE.

IT IS NOW YOUR DUTY TO DETERMINE WHICH OF THE TWO PENALTIES, DEATH OR CONFINEMENT IN THE STATE PRISON FOR LIFE WITHOUT POSSIBILITY OF PAROLE, SHALL BE IMPOSED ON THE DEFENDANT.

YOU ARE INSTRUCTED THAT UNDER THE STATE CONSTITUTION A GOVERNOR IS EMPOWERED TO GRANT A REPRIEVE, PARDON, OR COMMUTATION OF A SENTENCE FOLLOWING CONVICTION OF A CRIME.

UNDER THIS POWER A GOVERNOR MAY IN THE FUTURE COMMUTE OR MODIFY A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE TO A LESSER SENTENCE THAT WOULD INCLUDE THE POSSIBILITY OF PAROLE.

AFTER HAVING HEARD ALL OF THE EVIDENCE AND AFTER HAVING HEARD AND CONSIDERED THE ARGUMENTS OF COUNSEL YOU SHALL CONSIDER, TAKE INTO ACCOUNT AND BE GUIDED BY THE APPLICABLE FACTORS OF AGGRAVATION AND MITIGATING CIRCUMSTANCES UPON WHICH YOU HAVE BEEN INSTRUCTED.

YOU ARE INSTRUCTED THAT THE STATE HAS THE BURDEN OF PROVING THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT.

REASONABLE DOUBT IS DEFINED AS FOLLOWS: IT IS NOT A MERE POSSIBLE DOUBT BECAUSE EVERYTHING RELATING TO HUMAN AFFAIRS AND DEPENDING ON MORAL EVIDENCE IS OPEN TO SOME POSSIBLE OR IMAGINARY DOUBT. IT IS THAT STATE OF THE CASE WHICH AFTER THE ENTIRE COMPARISON AND CONSIDERATION OF ALL THE EVIDENCE LEAVES THE MINDS OF THE JURORS IN THAT STATE THAT THEY CANNOT SAY THEY

FEEL AN ABIDING CONVICTION TO A MORAL CERTAINTY OF THE TRUTH OF THE FINDING.

IF YOU CONCLUDE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES YOU SHALL IMPOSE A SENTENCE OF DEATH.

IF YOU ARE NOT SATISFIED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES YOU SHALL IMPOSE A SENTENCE OF CONFINEMENT IN THE STATE PRISON FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE.

YOU'LL NOW RETIRE AND SELECT ONE OF YOUR NUMBER TO ACT AS FOREMAN OR FORELADY, WHO WILL PRESIDE OVER YOUR DELIBERATIONS.

IN ORDER TO MAKE A DETERMINATION AS TO THE APPROPRIATE PENALTY, ALL TWELVE JURORS MUST AGREE.

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ANY VERDICT THAT YOU REACH MUST BE DATED AND SIGNED BY THE FOREMAN OR FORELADY ON A FORM THAT WILL BE PROVIDED, AND THEN YOU SHALL RETURN WITH IT TO THIS ROOM.

[Reporter's Transcript Volume XII
p. 1187 line 5 through
p. 1191 line 12]

NOTE REGARDING THE JUDGMENT OF THE CALIFORNIA SUPREME COURT

The opinion and judgment of the California Supreme Court in People v. Marcelino Ramos, Crim. No. 21352 (Sup.Ct.No. C-42382) is contained in the Appendix to the Petition for Writ of Certiorari at pages A-1 through A-144.

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

GEORGE DEUKMEJIAN
Attorney General
State of California
HARLEY D. MAYFIELD
Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101

PEOPLE OF THE STATE
OF CALIFORNIA,
Petitioner,

v.

MARCELINO RAMOS,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within JOINT APPENDIX of 8 NOVEMBER 1982 as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

State Public Defender
1390 Market Street, Suite 425
San Francisco, CA 94102
Attn: Ezra Hendon
Deputy State Public Defender

Court of Appeal
Fourth Appellate District
Division Two
303 West Third Street
Room 640
San Bernardino, CA 92401

Cecil Hicks
District Attorney
County of Orange
P.O. Box 808
Santa Ana, CA 92702

Lee A. Branch, Clerk
County of Orange
P.O. Box 838
Santa Ana, CA 92702
FOR DELIVERY TO THE HON.
R.J. BEACOM, JUDGE

California Supreme Court
350 McAllister Street, Room 4050
San Francisco, CA 94102

Each aforementioned envelope, with the postage prepaid, was sealed and deposited in the United States Mail by me at San Diego, California, on the ninth day of November, 1982. There is a delivery service by United States Mail at each place addressed above, and regular communication by United States Mail between the place of mailing and each place addressed above.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Ninth Day of November,
1982, at San Diego, California.

Clifford E. Reed Jr.
CLIFFORD E. REED, JR.

Opposition

Office - Supreme Court, U.S.
FILED
JUN 30 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

NO. 81-1893

PEOPLE OF THE STATE OF CALIFORNIA,

v.

MARCELINO RAMOS,

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

ALAN M. CAPLAN, ESQ.
BUSHNELL, CAPLAN, FIELDING & RUDY
ATTORNEYS AT LAW
680 Beach Street, Suite 365
San Francisco, CA 94109
(415) 563-4390

Attorneys assisting
MARCELINO RAMOS, in forma pauperis

QUESTION PRESENTED

Whether the instruction, required only in California, by which a jury in a capital case must be told of the Governor's power to commute life without parole sentencing but is not told of the Governor's power to commute death sentences injects a constitutionally misleading, speculative, and unreliable element into the jury's decision to impose the death penalty.

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

NO. 81- 1893

PEOPLE OF THE STATE OF CALIFORNIA,

v.

MARCELINO RAMOS,

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

For purposes of this Opposition, respondent accepts the recitations in the Petition respecting the opinion below, the jurisdiction of this Court, the constitutional and statutory provisions involved, and the procedural portions of the statement of the case except that respondent adds the following:

On February 11, 1982, petitioner filed an application with the California Supreme Court for stay pending the filing of the petition for certiorari. The application was denied on February 24, 1982.

On March 3, 1982, petitioner sought a stay from this Court pending the filing of the petition, and that too was denied on March 22, 1982.

The remittitur issued from the California Supreme Court on February 25, 1982 , and the matter is presently set for retrial of the penalty phase of the case in the Orange County Superior Court on September 10, 1982.

The statement of facts has been adequately set forth in the opinion of the California Supreme Court (Appendix A-5, A-15, A-16-A-25; 30 Cal.3d 553, 563-69), is not relevant to the issue tendered on this petition, and will not be set forth here.

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OPPOSITION

The petition in this case presents no issue worthy of this Court's attention because the decision of the California Supreme Court correctly disposed of the issue on its merits and because this Court would be called on to review a provision that exists nowhere but in California.

The options open to the jury at the penalty phase of a capital case in California are to sentence the defendant to life imprisonment without the possibility of parole or to death. (Cal. Pen. Code § 190.3.) In choosing between those options Penal Code section 190.3 provides that:

> "The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California."

The trier of fact is not also told that the Governor can commute death sentences.

The California Supreme Court correctly ruled that this provision -- which exists nowhere else in the nation -- was misleading and that it invited jurors to base their decision whether to spare or condemn the defendant on unreliable speculation unconnected to the defendant or his offense.

1. The Instruction is Misleading

No principle is more firmly rooted in the jurisprudence of capital punishment than that the death penalty may only be imposed on the basis of reliable information. See, e.g., Lockett v. Ohio (1978) 438 U.S. 586, 604 ("the qualitative difference between death or other penalties calls for a greater degree of reliability when the death sentence is imposed"); Gardner v. Florida (1977) 430 U.S. 349, 359 ("if [the information] is the basis for the death sentence, the [defendant's] interest in reliability plainly outweigh[s] the State's interest."); Woodson v. North Carolina (1976) 428 U.S. 280, 305 ("Because of [the] qualitative difference [between death and

other sentences], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). The instruction required by California Penal Code section 190.3 creates a misleading impression among jury members as to the relative finality of the two sentencing choices open to them and on that account produces an unreliable verdict.

The instruction misleads by means of partial disclosure, a kind of deception which the California Supreme Court recognized would in a civil context create a cause of action under California law for tortious deceit and fraudulent misrepresentation. People v. Ramos, supra, Appendix A-116, n. 21; 30 Cal. 3d at 597, n. 21. Even though the Governor of California is empowered to commute both life and death sentences (Cal. Const. art. V, § 8; Pen. Code §§ 4850-4852; In re Collie (1952) 38 Cal.2d 396; People v. Odle (1951) 37 Cal.2d 52, 58), and even though California Governors have over the years commuted far more death sentences than life without parole sentences (Report of the Governor of California, Acts of Executive Clemency in California, Appendix i-iv (1979)),[1] the instruction only informs the jury of the Governor's power to commute life without parole sentences.

The precise impact of this misleading instruction on the jury has been somewhat confused by the petition. The issue is not -- as the petition (see Petition 29-30) and the sole dissent below contend -- whether the defense would want the jury told the Governor can commute death sentences. Rather, the question is what impression the jury is left with about the finality of its sentencing choices when it is told the Governor can tamper with one of those choices, but is not told he can also affect the other choice. A juror advised only of the Governor's power to reduce a life without parole sentence may

1. The Report indicates that between 1941 and 1979, 41 death sentences and 24 life without parole sentences were commuted by California Governors.

opt for a death sentence in the mistaken belief that that sentence will provide the only iron-clad assurance the defendant will never be free again. That assumption is, of course, wrong. The California Supreme Court's conclusion that the Constitution will not tolerate a sentence of death predicated on so fundamental a misconception by the jury of the effect of its decision was clearly correct and should not be disturbed.

2. The Instruction Invites Decisions Based on Speculation and Caprice

The California Supreme Court was also correct in its conclusion that death sentences based on fear of some future Governor's possible commutation of a life without parole sentence are constitutionally unacceptable because they breed decisions based on speculative factors unrelated to the defendant's character or crime.

A major thrust of this Court's capital sentencing decisions in recent years has been to direct the jury's choices away from those arbitrary factors condemned in Furman v. Georgia (1972) 408 U.S. 238, and to guide the jury's discretion toward "consideration of the character and record of the individual offender and the circumstances of the individual offense." (Woodson v. North Carolina, supra, 428 U.S. at 304; Lockett v. Ohio, supra, 438 U.S. at 603-08.) Decisions based on what a future Governor may or may not do are wholly unconnected either to the defendant or his crime and are simply not dependable.

The most superficial review of California commutation statistics over the preceding 40 years makes clear that any jury deciding whether to spare or condemn an individual defendant on the basis of whether a future Governor will or will not commute the sentence imposed is basing its decision on the sheerest speculation.[2/]

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2. A study of gubernatorial commutation actions in death penalty and life without parole cases between 1941 and 1978 reveals that Governor Olson commuted three death sentences and three life without parole sentences. Governor Warren commuted

(footnote 2 continued)

The Supreme Court of Louisiana has recently examined the constitutional problems posed by trial court instructions and prosecutorial argument on the subject of the Governor's power to commute life sentences and to pardon. In State v. Willie (1982) ___ La. ___, 410 So.2d 1019, 1033, the court came to the same conclusion as did the California Supreme Court in this case, noting:

> "There is more at issue in this case, however, than whether prosecuting attorneys and trial courts must follow statutory rules of evidence and procedure. The injection of pardon and commutation questions into a sentencing proceeding tends to skew the legislature's constitutionally sound death penalty scheme. Jurors are thereby encouraged to consider the vicissitudes of executive clemency instead of the clear, objective, and specific standards enacted for the purpose of channeling their discretion. Although the jury has no constitutional oversight of executive policy, it is impelled, although ill equipped, to predict and pass judgment on future commutation and parole practices. The substitution of this conundrum for the clear, objective statutory standards encourages the jury to exercise unbridled discretion of the latitude found constitutionally objectionable by the United States Supreme Court in our former statute."

As we see, the view of Louisiana and California are shared by nearly all jurisdictions, and this provides the final reason why this Court should deny the petition.

3. The Instruction Condemned Below is Unique

Only California requires that juries be instructed selectively on the Governor's power to commute life without parole sentences. Indeed, the overwhelming number of jurisdictions condemn any comment whatsoever in a capital case on the Governor's power to commute. (See, e.g., Kendrick v. State (Ala. 1975) 312 So.2d

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(footnote 2 continued)

eight death sentence and one life without parole sentence. Governor Knight commuted six death sentences and one life without parole sentence. Governor Edmund G. Brown, Sr. commuted 23 death sentences and 15 life without parole sentences. Governor Reagan commuted one death sentence and four life without parole sentences. The present Governor has commuted no death sentences and no life without parole sentences. Report of Governor, supra, Acts of Executive Clemency of California Granted for Period January 1, 1979 through December 31, 1979, Appendix following p. 32 at i-iv.

583; Andrews v. State (Ark. 1971) 472 S.W.2d 86; Sukle v. People (Colo. 1941) 111 P.2d 233; see also Jones v. People (Colo. 1961) 360 P.2d 686; Smith v. State (Dela. 1974) 317 A.2d 20; Thomas v. State (Ga. 1977) 242 S.E.2d 1; see also McGruder v. State (Ga. 1957) 98 S.E.2d 564; Barton v. Commonwealth (Ky. 1968) 429 S.W.2d 407; State v. Willie, supra, (La. 1982) 410 So.2d 1089; State v. Lindsey (La. 1981) 404 So.2d 466; Shoemaker v. State (Md. 1962) 180 A.2d 692; State v. Jones (N.C. 1979) 251 S.E.2d 425; Cox v. State (Okla. 1971) 491 P.2d 357; Commonwealth v. Johnson (Pa. 1951) 81 A.2d 569; see also Commonwealth v. Aljoe (Pa. 1966) 216 A.2d 50; Jones v. Commonwealth (Va. 1952) 72 S.E. 2d 693; see also Hinton v. Commonwealth (Va. 1978) 247 S.E.2d 704; State v. Todd (Wash. 1979) 474 P.2d 542; Lovely v. United States (4th Cir. 1948) 169 F.2d 386; Krull v. United States (5th Cir. 1957) 240 F.2d 122.

Even among jurisdictions which permit mention of the possibitility of commutation or parole, most require an accompanying admonition that the jury may not consider such factors in arriving at their decision. See Burnette v. State (Fla. 1963) 157 So.2d 65; Feggins v. State (Ind. 1977) 359 N.E.2d 517; State v. White (N.J. 1958) 142 A.2d 65; State v. Leland (Ore. 1951) 227 P.2d 785; State v. Atkins (S.C. 1970) 172 S.E.2d 111; State v. Lindsey (W.Va. 1977) 233 S.E.2d 734; State v. Carroll (Wyo. 1937) 69 P.2d 542.

None of the cases cited by petitioner require that a jury be selectively informed of the Governor's power to commute life but not death sentences and the very portion of Brewer v. State (Ind. 1981) 417 N.E.2d 889, 909 quoted by petitioner (Petition at 36) makes clear that the jury should be "fully aware of the consequences of a prison sentence as well as the consequences of a death sentence." (Emphasis added.)

The California instruction is the only one of its kind in the country and the California Supreme Court's treatment

of the instruction was correct. The case therefore raises no issue requiring oversight by this Court and therefore the Court should deny the petition.

DATED: June 24, 1982

Respectfully submitted,

BUSHNELL, CAPLAN, FIELDING & RUDY

by 

ALAN M. CAPLAN, Attorneys
Assisting MARCELINO RAMOS,
in forma pauperis

AFFIDAVIT OF SERVICE BY MAIL

Attorney: BUSHNELL, CAPLAN, FIELDING & RUDY No. 81-1893

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
vs.
MARCELINO RAMOS,
Respondent.

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, in which county the within mentioned mailing occurred, and not a party to the subject cause, my business address being 680 Beach Street, San Francisco, California 94109.

I served the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the California Supreme Court as follows: an original and three copies on the United States Supreme Court, Michael Rodak, Jr., Clerk, United States Supreme Court, Washington D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed by placing one copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectfully as follows:

George Deukmejian,
Attorney General
110 West "A" Street, Suite 700
San Diego, CA 92101

Office of the State Public Defender
1390 Market Street, Suite 425
San Francisco, CA 94102

Cecil Hicks,
District Attorney
Orange County Courthouse
P.O. Box 808
Santa Ana, CA 92702

California Supreme Court
Office of the Clerk
350 McAllister Street, Rm. 4050
San Francisco, CA 94102

Lee A. Branch, Clerk
County of Orange, Courthouse
P.O. Box 8
Santa Ana, CA 92702

For Delivery to:
Honorable R. J. Beacom, Judge

Each envelope was then sealed and with the postage prepaid, deposited in the United States mail by me at San Francisco, California, on June 29, 1982.

There is a delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at San Francisco, California on June 29, 1982.

Alan M. Caplan

State of California)
) ss.
County of San Francisco)

On this 29 day of June, 1982, before me, BARBARA BREUER, personally appeared ALAN M. CAPLAN, personally known to me to be the person whose name is subscribed to this instrument, and acknowledged that she executed the same.

Barbara Breuer
BARBARA BREUER, Notary Public

OFFICIAL SEAL
BARBARA BREUER
NOTARY PUBLIC-CALIFORNIA
City and County of SAN FRANCISCO
My Commission Expires Dec. 4, 1984

Petitioner's Brief

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 81-1893

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

BRIEF ON THE MERITS

GEORGE DEUKMEJIAN,
Attorney General
ROBERT PHILIBOSIAN,
Chief Assistant Attorney General
Criminal Law Division
DANIEL J. KREMER,
Assistant Attorney General
JAY M. BLOOM,
Deputy Attorney General
HARLEY D. MAYFIELD,
Deputy Attorney General

110 West "A" Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7759

Attorneys for Petitioner

PETITION FOR CERTIORARI FILED APRIL 13, 1982
CERTIORARI GRANTED OCTOBER 4, 1982

QUESTION PRESENTED

Whether a statute which requires an instruction in a capital case that the punishment of life imprisonment without the possibility of parole may in the future be commuted or modified to include the possibility of parole violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; particularly where the statute also prescribes specific guidelines for the jury and requires it to find that aggravating circumstances outweigh mitigating circumstances as a prerequisite to imposition of the death penalty.

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NO. 81-1893

IN THE SUPREME COURT OF THE UNITED STATES

October term 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the California Supreme Court affirming the judgment of guilt but reversing the penalty of death is reported in People v. Ramos (1982) 30 Cal.3d 553 [180 Cal.Rptr. 266, 639 P.2d 908] and is included as Appendix A to the petition for certiorari. A modification to the opinion is reported at 30 Cal.3d page 879a, and is included as Appendix C to the petition for certiorari.

JURISDICTION

The judgment of the California Supreme Court was filed on January 25, 1982. (Appen. A to Pet. for Cert.) A timely petition for hearing was denied on February 24, 1982. (Appen. B to Pet. for Cert.) The petition for certiorari was filed on April 13, 1982, within 60 days after the petition for rehearing was denied. The petition for certiorari was granted on October 4, 1982. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendments Five, Fight and Fourteen.

2. California Constitution, Article V, section 8.

3. California Penal Code, sections 190, 190.2, 190.3, 190.4 and 4801.

4. California Administrative

Code, Title 15, section 2817.

The text of California Penal Code sections 190.2 and 190.4 are set forth in the Appendix to this Brief. The text of each of the other cited provisions, statutes and regulations is set forth in Appendix D to the petition for writ of certiorari.

STATEMENT OF THE CASE

In a four-count information filed by the District Attorney of Orange County respondent Marcelino Ramos and a co-defendant, Ruben Gaitan, were accused of the robbery and murder of Kathryn Parrott and the robbery and attempted murder of Kevin Pickrell. It was further alleged that respondent had used a firearm in the commission of each of the offenses, that he intentionally inflicted great bodily injury on Kevin Pickrell and that the murder of Kathryn Parrott was committed while the defend-

ants were engaged in the commission and attempted commission and immediate flight after committing robbery. Additional allegations of murder for financial gain and specially heinous murder were stricken before trial. (JA 5-11; CT 143-145, 290, 311.) 1/

Jury selection commenced on November 27, 1979. On December 6, 1979, the jury returned its verdicts finding respondent guilty as to all counts, with the murder and attempted murder fixed at first degree, and all the special allegations true. 2/ The penalty phase commenced on December 11, 1979, and on December 19, the jury returned its

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1. The designation "JA" refers to the Joint Appendix. The designation "CT" refers to the Clerk's Transcript which is in two volumes and is a part of the record.

2. Ruben Gaitan was also found guilty of the robberies and first degree murder and attempted murder, but all the special allegations were found not true. His conviction was affirmed by the Court of Appeal in an unpublished opinion (4 Crim. 12298).

verdict finding the penalty to be death. On January 25, 1980, respondent's motions to modify the verdict and for new trial were denied. He was sentenced to death for the murder of Kathryn Parrott. Sentences of imprisonment were imposed for the other offenses and stayed. (CT 442, 521, 532, 541d, 550, 637-646, 681-684, 716-720.) An appeal from the judgment imposing the death penalty was automatically taken to the California Supreme Court.

A. Facts Relating to the Offense.

On the evening of June 2 and early morning of June 3, 1979, Kevin Pickrell and Kathryn Parrott were working at a Taco Bell restaurant at 2820 South Bristol in Santa Ana. They were expecting to close at 1:00 a.m. Shortly before that time a "customer", later identified as respondent's co-defendant, Ruben Gaitan, came in and presented a piece of paper

with a food order on it to Kathryn Parrott. (RT 97, 317-320, 330-331.)

As Pickrell was preparing the food order presented by Gaitan, respondent, who was employed at the Taco Bell, entered and asked to check his work schedule. Pickrell indicated that respondent could go into the back to check his schedule. He went to the back, then returned shortly and displayed a gun. Respondent ordered Ms. Parrott and Pickrell into a walk-in refrigerator. Gaitan went into the refrigerator first and removed a fire axe from the wall. That was the last Pickrell saw of Gaitan. (RT 324-335, 373, 376-379, 383-384.)

Respondent ordered Pickrell and Ms. Parrott to sit down in the refrigerator and asked them both for the location of the keys to the safe. They told him the keys were in the safe, and he went out. Pickrell and Ms. Parrott began

talking, with Pickrell expressing the fear that respondent would kill them because he knew them. Respondent returned, told them to be quiet and left again. (RT 336-337, 341-342, 352-353.)

Respondent was gone for about five minutes, then returned and told Ms. Parrott and Pickrell to go to the back of the walk-in. When they got to the back wall, he told them to kneel and they did so. He told them to take their hats off and bend their heads down. He told them to say their prayers. Pickrell asked him not to hurt them and respondent just sort of laughed. He told Ms. Parrott to put a rag in her mouth. After that, Pickrell heard her moan and felt her come toward him. He then felt a sharp blow to the back of his head and fell over. He felt another blow to his head and heard ringing in his ears. (RT 355-362.)

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Pickrell lay with his eyes closed, thinking he might be dead, but opened his eyes and saw the floor. He lay there for awhile, then got up, got some change and called the police. When the police arrived he told them it was respondent who had been in the walk-in at the time he was injured. (RT 362-367.)

A police officer who arrived about 1:20 a.m. found Kathryn Parrott lying motionless in the refrigerator with a terrycloth towel stuffed in her mouth, and with no pulse. (RT 2-10, 3-4, 13-17.) The autopsy surgeon concluded Ms. Parrott died from cerebral destruction due to a gunshot wound to the head. There was a single gunshot wound which appeared to be a contact wound. Additionally, she had suffered two deep lacerations in the back of the head which appeared to have been inflicted at or about the time of death, and had been

inflicted by a blunt, heavy object. (RT 69-77.) Kevin Pickrell had suffered lacerations to the back of the head, including one with an area around it which appeared to be a burn or abrasion. It appeared he had been struck in the back of the head with a metallic object that then moved around to the side of the head, hit a bony prominence and shattered, with some fragments continuing on and exiting the head, taking some tissues from the ear as they left. (RT 305-310, 314.)

The manager of the Taco Bell calculated a loss of approximately $1,200.00 from the robbery. (RT 37-41.) Respondent and Gaitan were taken into custody on June 3, and the same day an apartment at 3101 South Bristol was searched pursuant to a warrant. Money in the amount of approximately $1,000.00 was recovered. (RT 101, 103-105, 117.)

Respondent did not present a defense at the guilt phase. Ruben Gaitan testified in his own behalf and admitted copying a food order which respondent had prepared while they were in the apartment, but denied any connection with the robbery and killing. (RT 452, 455, 457-460, 467-469.)

B. Additional Evidence at Penalty Phase

At the penalty phase the prosecution presented the testimony of one David Lam, who had been in custody for felony non-support in June of 1979. One morning while awaiting to go to court he saw respondent standing in front of him, chained with two other people. He overheard bits and pieces of a conversation to the effect that they were not going to be found guilty of the charge because they were sure the people were no longer alive. Respondent was saying to the other person how much of a "trip" it was;

how the people were on their hands and knees begging for their lives before he shot them. (RT 729-732.) The People also introduced evidence of portions of' guns, a notebook, letter and will which were found in the apartment. (RT 754-760, 762-764.)

The presentation of defense evidence concerned the largest portion of the penalty phase. [3/] Respondent testified on his own behalf and admitted robbing and shooting both the victims, but denied that he intended to kill them. He testified that when he first went back into the cooler he had merely knocked out the victims with a piece of iron pipe. Ruben Gaitan had told him it was necessary to kill them, so he had gone back in

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3. Defense evidence presented at the penalty phase is set forth at some length in the opinion of the California Supreme Court. (30 Cal.3d at pp. 564-567; Pet. for Cert., Appen. A, pp. A-10 to A-15.)

and pointed the gun at each one of the victims with the intent just to graze them and knock them out. (RT 834-854, 877, 900.) He testified that the only reason he told the victims to say their prayers before he pulled the trigger was just to scare them, and he did not laugh but just smiled. (RT 913, 930.) He also testified to the effect that Kevin Pickrell had laughed at him when he first displayed the gun, and that made him mad. He further testified that he had had one or two drinks and had taken some "speed." (RT 844-846.)

Friends and relatives testified as to respondent's childhood and early youth in San Antonio, Texas. Respondent and his brother had been adopted when they were infants, and both adoptive parents had died by the time he turned fourteen. After that he stopped going to school regularly and began

hanging around with bad company, including Ruben Gaitan. Although respondent had gone into the Texas National Guard at one time, otherwise he had worked only at menial jobs. (RT 774-779, 792-800.)

A psychiatrist expressed the opinion that respondent was an inadequate personality, with a diffused, generalized type of brain damage and elements of a borderline schizophrenic personality. He opined that some of the dynamics of the shooting included respondent's pre-existing personality factors, the taking of amphetamines with alcohol a few hours before, pre-existing brain damage, disordered reality testing, anger at Ruben Gaitan and anger because Kevin Pickrell did not at first take him seriously. The doctor also believed that respondent may have intended only to graze the victims. (RT 959-960, 970-971, 992-1001.)

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A defense psychologist testified respondent had a full scale I.Q. of 75, and that the result of a test of neurological impairment indicated mild congenital brain damage. (RT 1069, 1076-1073.)

C. Facts Relating to the Instruction.

Before commencement of the penalty phase defense counsel submitted a written motion to modify the proposed jury instructions to delete the portion which referred to the Governor's power to commute a sentence of life imprisonment without parole. (JA 12-22; CT 665-671.) The motion was denied by the trial court on the ground the instruction was mandated by legislation. (JA 23; RT 718.)

In cross-examination of a defense psychiatrist at the penalty phase the prosecutor elicited testimony that in discussing his feelings of revenge resp-

ondent had indicated his awareness that the Governor could commute a sentence of life without parole to life, although he did not consider it viable for him. (JA 24-25; RT 1051-1052.) He also elicited testimony that respondent had told the psychiatrist the Governor would not commute his sentence; he did not want false hope, and would prefer the death penalty. Respondent said if he were released for example, after 20 years, he would build up revenge against the people who "put me in here"; for example, the district attorney, jurors, judge, detectives and witnesses. (RT 1055-1056.)

During his argument to the jury, which covers 61 pages of the Reporter's Transcript (RT 1096-1156), the prosecutor twice referred to the possibility of parole. In his preliminary remarks he indicated life without parole "does not quite mean that". (JA 26; RT 1098.)

Shortly thereafter the prosecutor read to the jury each of the instructions they would receive. (RT 1104-1112.) Among those was the instruction regarding the possibility of parole, and the prosecutor prefaced the reading of that with the comment: "And, the judge tells you something, which the doctor has already indicated Mr. Ramos is aware." (JA 27; RT 1110-1111.)

Defense counsel's argument covers 30 pages of the Reporter's Transcript (RT 1157-1186). During his argument he suggested four possible reasons for imposing the death penalty: to make a political statement, for deterrence, for revenge or for necessity. (RT 1159-1161.) As to the latter, defense counsel argued that there were others in prison who had committed worse crimes than respondent, but were eligible for parole consideration. He pointed out

that with a sentence of life without parole there was no legal right to appear before the parole board. He asserted the present Governor had not "pardoned" any one, and that one previous governor had pardoned one killer because he was innocent. He warned the jury that they would have to stand before the Creator some day, urged that "I had to" was the only satisfactory answer to give for imposing the death penalty and argued that both punishments were terrible, with one more terrible than the other. (JA 29-32; RT 1161-1162.)

After instructing the jury as to its duty to determine whether the punishment of death or confinement in the state prison for life without the possibility of parole should be imposed the trial court instructed the jury as follows:

"In determining which penalty is to be imposed on defendant, you shall consider all of the evidence and all of the applicable instructions on the law which have been received during any part of the trial of this case, except as you may hereafter be instructed.

"You shall consider, take into account and be guided by the following factors, if applicable:

A, The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true;

B, The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;

C, The presence or absence of any prior felony conviction;

D, Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

/

E, Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

F, Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

G, Whether or not the defendant acted under extreme duress or under substantial domination of another person;

H, Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication;

I, The age of the defendant at the time of the crime;

J, Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

K, Any other circumstances which extenuate the gravity of the crime even though it is not a legal excuse for the crime.

"In weighing the aggravating and mitigating factors, you are not to merely count numbers on either side.

"You are instructed rather to weigh and consider the factors on each side as a whole.

"It is now your duty to determine which of the two penalties, death or confinement in state prison for life without possibility of parole, shall be imposed on the defendant.

"You are instructed that under the State Constitution a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime.

"Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

"After having heard all of the evidence and after having heard and considered

the arguments of counsel you shall consider, take into account and be guided by the applicable factors of aggravation and mitigating circumstances upon which you have been instructed.

"You are instructed that the state has the burden of proving that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt.

"Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that state that they cannot say they feel an abiding conviction to a moral certainty of the truth of the finding.

"If you conclude beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances you shall impose a sentence of death.

> "If you are not satisfied beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances you shall impose a sentence of confinement in the state prison for life without the possibility of parole." (JA 33-39; RT 1188-1191.)

D. The Judgment of the California Supreme Court.

On January 25, 1982, the California Supreme Court held that the penalty phase instruction required by California Penal Code section 190.3, regarding the Governor's power to commute or modify a sentence of life imprisonment without parole, denied respondent due process rights guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. The judgment was reversed insofar as it related to penalty, and in all other respects affirmed. (People v. Ramos, supra, 30 Cal.3d 553, 590-602 [180 Cal.Rptr. 266,

639 P.2d 908]; Appen. A to Pet. for Cert. pp. 95-132.)

SUMMARY OF ARGUMENT

California Penal Code section 190.3 requires the trier of fact at the penalty phase of a capital case to determine whether the punishment shall be death or life imprisonment without the possibility of parole. The death penalty may be imposed only if aggravating circumstances outweigh mitigating circumstances. The statute also requires that the jury be accurately instructed that a sentence of life imprisonment without the possibility of parole may in the future be modified so as to include the possibility of parole.

The California statute prescribing that procedural requirement is presumed valid. Although there is a difference of opinion whether such an instruction should be given it is reason-

able for California to conclude that a jury is more likely to return an erroneous penalty verdict if they are misled into believing that the alternative to death is perpetual imprisonment without any hope for release.

A convicted murderer has no constitutional right to have accurate information regarding the effect of the alternative sentence concealed from the jury. The instruction neither denies any fundamental right of the defendant nor increases the risk of an arbitrary or capricious sentencing decision. Since the jury is fully instructed as to aggravating and mitigating circumstances which they must consider in determining the penalty, the instruction has no tendency to divert jurors from their duties or lead them to violate their oaths.

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California's decision not to require an instruction regarding possible modification of a death penalty is entirely reasonable. Such an instruction could minimize the jury's sense of responsibility and increase the likelihood of an unreliable decision. Such an instruction is of no conceivable benefit to a defendant.

The record in this case reveals no undue emphasis on the instruction and no denial of respondent's due process rights.

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ARGUMENT

I

INSTRUCTING THE JURY AT THE PENALTY PHASE OF A CAPITAL CASE AS TO THE INDISPUTABLE FACT THAT THE PRESCRIBED ALTERNATIVE SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE MAY IN FUTURE BE MODIFIED TO INCLUDE THE POSSIBILITY OF PAROLE DOES NOT DENY DUE PROCESS

A brief review of the recent history of capital punishment legislation in California is pertinent in placing the present issue in context. In People v. Anderson (1972) 6 Cal.3d 628, 656 [100 Cal.Rptr. 152, 493 P.2d 880] the California Supreme Court held the death penalty was cruel or unusual within the meaning of the California Constitution. In November of 1972 the people of California adopted a constitutional amendment (Cal. Const., Art. I, § 27)

to restore the death penalty. (See Gregg v. Georgia (1976) 428 U.S. 153, 181.) Pursuant to that constitutional authorization, and after this Court's decision in Furman v. Georgia (1972) 408 U.S. 238, the California Legislature adopted statutes providing a mandatory death penalty for certain aggravated forms of murder and other offenses. (Cal. Stats. 1973, Chap. 719.) Following this Court's interpretation of Furman in Gregg v. Georgia, supra, and the other cases decided the same day, California's mandatory statutes were held invalid. (Rockwell v. Superior Court (1976) 18 Cal.3d 420, 445 [134 Cal.Rptr. 650, 556 P.2d 1101].)

By emergency legislation effective August 11, 1977, (Cal. Stats. 1977, Chap. 316) the California Legislature adopted new capital sentencing procedures. That legislation was upheld

in People v. Frierson (1979) 25 Cal.3d 142, 172-184 [158 Cal.Rptr. 281, 599 P.2d 587]. The holding of Frierson was followed in People v. Jackson (1980) 28 Cal. 3d 264, 315-317 [168 Cal.Rptr. 603, 618 P.2d 149] (cert. den. 450 U.S. 1035) and People v. Harris (1981) 28 Cal. 3d 935, 964 [171 Cal.Rptr. 679, 623 P.2d 240] (Cert. den. 102 Supreme Ct. 365, 73 L.Ed.2d 1322).

Meanwhile, on November 7, 1978, the voters of California adopted Proposition 7, an initiative statute, by a margin of 71.1% (4,480,275) to 28.0% (1,818,350). (Statement of Vote & Supp., Gen. Election (Nov. 7, 1978), compiled by March Fong Eu, Sec. of State.) That statute, in effect now and at the time respondent's crimes were committed, expanded the list of "special circumstances" requiring the punishment of death or life imprisonment without the

possibility of parole for defendants convicted of first degree murder and amended some of the language in the provisions for determining punishment.

Under the initiative statute the punishment for murder in the first degree is punishable by death or confinement in state prison for life without possibility of parole if certain special circumstances are alleged and found true, and otherwise punishable by confinement in the state prison for a term of 25 years to life. (Pen. Code, §§ 190, 190.2.) If special circumstances set forth in Penal Code section 190.2 are alleged the defendant's guilt is first determined. If he is found guilty of first degree murder, the jury at the same time determines the truth of any alleged special circumstances (other than an alleged prior murder conviction). A special circumstance

allegation must be proved beyond a reasonable doubt. (Pen. Code, §§ 190.1, 190.4, subd. (a).) If the trier of fact finds one or more alleged special circumstances true there is a separate penalty hearing at which the trier of fact is a jury unless waived by both the defendant and the People. If the guilt trial was by jury the same jury considers the penalty unless good cause is shown for discharging that jury. If the trier of fact is the same at the guilt and penalty phases evidence presented at the guilt phase may be considered on penalty. (Pen. Code, § 190.4, subds. (a) - (c).)

Penal Code section 190.3 sets forth the procedure at the penalty phase. With the exception of some restrictions on the prosecution it permits the presentation of evidence by both the People

and the defendant as to any matter relevant to aggravation, mitigation and sentence. The section provides in part:

> "The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the state of California."

Subdivisions (a) through (k) of the section set forth specific factors which the trier of fact is to consider, if relevant. The section requires the trier of fact to impose a sentence of death if it concludes aggravating circumstances outweigh mitigating circumstances or a sentence of confinement in state prison for a term of life without the possibility of parole if it concludes mitigating circumstances outweigh aggravating circumstances.

In any case in which the trier of fact has returned a verdict or finding imposing the death penalty the defendant is deemed to make a motion for modification of the verdict or finding. The trial judge must set forth on the record his reasons for granting or denying the motion. An order granting the motion for modification is reviewable on appeal by the People, and an order denying the motion is reviewable on the defendant's automatic appeal. (Pen. Code, § 190.4, subd. (e).)

It is the instruction required by Penal Code section 190.3 which the Supreme Court of California found to deny respondent's due process rights under the Federal Constitution.

A. The Statutory Provision is Presumed Constitutional.

It is a fundamental precept in our constitutional form of government

that statutes are presumed constitutional. That presumption has been described as the "postulate of constitutional adjudication" (New York v. O'Neill (1959) 359 U.S. 1, 6) and has been consistently recognized by the decisions of this Court. (See e.g., Gregg v. Georgia, supra, 428 U.S. 153, 175; McDonald v. Board of Election (1969) 394 U.S. 802, 809; Flemming v. Nestor (1960) 363 U.S. 603, 617; Atchison Topeka and Santa Fe R. Co. v. Matthews (1899) 174 U.S. 96, 104.)

The presumption of reasonableness of the procedural rule enacted in Penal Code section 190.3 is with the state. (Salsburg v. Maryland (1954) 346 U.S. 545, 553.) Accordingly, to find it invalid the court must find clear incompatibility with the United States Constitution. (New York v. O'Neill, supra, 359 U.S. 1, 6.)

B. Informing the Penalty Jury As to the Possibility of Parole Neither Violates Any Fundamental Right of The Defendant nor Creates The Risk of an Arbitrary Or Capricious Sentence.

If California chose to eliminate the sentence of life imprisonment without possibility of parole and require the penalty jury to choose between a sentence of death or imprisonment for 25 years to life it could not reasonably be suggested that the defendant's due process rights were violated because the jury might speculate as to possible future parole action. Yet the California Supreme Court holds that the effect of the instruction in this case:

> "... may be to lead the jury to base its life-or-death decision at least in part on a speculative preduction of possible future gubernatorial action, rather than on the defendant's crime, his character and his record." (People v. Ramos, supra, 30 Cal.3d 553, 596.)

Petitioner submits that it is constitutionally permissible for the state to require the penalty jury be informed as to the meaning of an alternative punishment of imprisonment whether that term is described as a specified term of years or life imprisonment without the possibility of parole. If jury sentencing is considered desirable in capital cases in order to maintain a link between contemporary community values and the penal system (Gregg v. Georgia, supra, 428 U.S. 153, 190), surely the Constitution does not require that the jury be kept in the dark regarding the possibility of parole.

There is and has been a difference of opinion among the states on the question whether penalty phase jurors in capital cases should be informed of parole. However, petitioner is aware of no case other than this one in

which providing that information was held to violate the Federal Constitution.

In Brewer v. State (Ind. 1981) 417 N.E.2d 889 (Cert. den. 102 S. Ct. 3510) the penalty jury interrupted its deliberations and asked when the defendant would be eligible for parole if a life sentence were imposed. After consultation with counsel the trial court informed the jury if the death penalty was not imposed the penalty was a fixed sentence of 30 to 60 years and that one could earn credit for good behavior to apply against the sentence, with a maximum allowable credit of 50% of the sentence. The court further instructed that the sentence would be fixed by the court, and that the determination of the jury would not be binding but would be a recommendation only. (Id., at p. 908.) After concluding that it did not have to review the question

because it was not fundamental error the court elected to address it anyway and provided guidance as follows:

> "Although we have condemned arguments and instructions that invite or tempt the jury to consider the ultimate sentence likely to be served, Feggins v. State, (1977) 265 Ind. 674, 359 N.E.2d 517; Inman v. State, (1979) Ind., 393 N.E.2d 767, our concern has been with cases where there was no need for the jury to have such information, because, under the law, they were not concerned with sentencing. Imparting such knowledge, therefore, could not be beneficial, and the potential for polluting the guilt determination was present. We are not confronted with that problem, however, in the case before us. Not only had the guilt determination been made and thus could not be influenced, but also there was a definite need for the jury to have such information.
>
> "Notwithstanding that the sentence determination by the jury is not binding upon the judge, we do not regard it as a mere formality having no substantive value.

> If we did, error if any, in such regard could not be other than harmless. On the contrary, the recommendation of the jury is a very valuable contribution to the process, in that it comes from a group representative of the defendant's peers, who are likely to reflect, collectively, the standards of the community. The ultimate determination cannot be made in a vacuum. Hence recommendations, if they are to have relevance, must be arrived at in the light of available alternatives. Given the task of the jury at this stage of the hearing, it is altogether proper that they be fully aware of the consequences of a prison sentence as well as of the consequences of a death sentence."

In other recent cases the Supreme Court of Louisiana has taken the opposite view. In State v. Lindsey (La. 1981) 404 S.2d 466 the court found prejudicial error when the judge gave a lengthy charge regarding commutation and pardon on the jury's request for a definition of life imprisonment, and the prosecutor suggested in argument that the court system could play some role in

releasing the defendant. (Id. at pp. 484-485, 487-488.) In State v. Brown (La. 1982) 414 S.2d 689, the court found reversible error where the trial court accurately responded to jury questions regarding parole or pardon and the jury returned with a verdict recommending the death penalty after 17 minutes additional deliberation. (Id. at pp. 699-701.) Three justices dissented, finding neither error nor prejudice. (Id., at pp. 701-703.)

Other state courts have approached the problem in differing ways. For example, the Supreme Court of Nevada has held that where the jury must choose between life imprisonment, life without parole and death it is proper to inform the jury that a sentence of life imprisonment without parole is subject to review at a later date. (Summers v.

State (Nev. 1970) 86 Nev. 210 [467 P.2d 98, 99-100].) The Supreme Court of New Jersey held that in order to fulfill the legislative will the trial court should respond to juror queries with an explanation of parole, but should caution them to the effect the possibility of parole must be excluded from their considerations. (State v. White (1958) 27 N.J. 158 [142 A.2d 65, 76-77].)

Differing views on the subject are perhaps exemplified by decisions of the California Supreme Court. In People v. Barclay (1953) 40 Cal.2d 146, 158 [252 P.2d 321] it had been held that ". . .the court may instruct the jury as to the consequences of the different penalties that may be imposed so that an intelligent decision may be made." In People v. Seiterle (1963) 59 Cal.2d 703, 709 [31 Cal.Rptr. 67, 381 P.2d 947] it was held proper to instruct the jury in

a case involving an offense punishable by death or life imprisonment without the possibility of parole for the court to instruct the jury that the Legislature might at some future time change the law in a manner effecting parole eligibility.

In People v. Morse (1964) 60 Cal.2d 631 [36 Cal.Rptr. 201, 388 P.2d 33] the California Supreme Court reconsidered the previous practice of permitting evidence, instructions and argument regarding parole and the power of the trial judge or the Governor to reduce the death penalty. The court held that since individual jurors often entertain some ideas about parole laws the court should render instructions which inform them generally of the operation of those laws but which also instructed them that the matter of parole was not to be considered in their determination of punishment. (60 Cal.2d at pp. 647-648.)

It further held the jury should not be instructed as to the judge's and Governor's power to reduce the death penalty since such instructions tend to mislead the jury into assuming that the rendition of the penalty initiates a chain of proceedings by the court and the Governor which will achieve a re-weighing of the sentence and possibly produce its nullification. (Id., at p. 653.) The court later held the Morse instruction must be given sua sponte, but was not required in a case where the jury had been informed the defendant had been sentenced to life imprisonment without parole for another offense. (People v. Varnum (1969) 70 Cal.2d 480, 489-491 [75 Cal.Rptr. 161, 450 P.2d 553].)

It is notable that the majority of cases involving this issue arise because of juror inquiries. Several

courts have recognized that the availability of parole and commutation in capital cases is readily understood among lay persons. (See State v. Carroll (1937) 52 Wyo. 29 [69 P.2d 542, 560]; State v. Cherry (1979) 298 N.C. 86 [257 S.E.2d 551, 561]; Grandsinger v. State (1955) 161 Neb. 419 [70 N.W.2d 632, 651] (Cert. den. 352 U.S. 880); Paramore v. State (Fla. 1969) 229 S.2d 855, 860; Sullivan v. State (1936) 47 Ariz. 224 [55 P.2d 312, 318-319].)

A state's decision whether an instruction regarding parole should be given may legitimately depend upon the unique aspects of its own procedure and its expectations regarding its citizens' intelligence and ability to follow their oaths as jurors. Pertinent questions as to the effects of such an instruction include: (1) Does it affect the determination of guilt? (2) Does it tend to

distort the deliberative process? (3) Is the jury otherwise instructed as to its duty in determining penalty? Consideration of all those questions reasonably permits the determination to require the instruction under the California procedure.

First, the instruction can have no possible effect on either the determination of guilt or the finding of the special circumstance which authorizes imposition of the death penalty since those findings are made at a separate, earlier proceeding. Thus the procedure could in no way "enhance the risk of an unwarranted conviction". (Cf. Beck v. Alabama (1980) 447 U.S. 625, 637. See Comment (1963) 15 Stan.L. Rev. 351 (suggesting that jurors should not be informed of parole when the issue is guilt alone but should be so informed when determining punishment).)

The second question is not so easily answered. However, it appears reasonable to postulate that when a choice between punishments is to be made, whether by a jury or a judge, that choice may be more rationally made if the alternatives are understood. Conversely, the risk of an erroneous decision may be increased if the sentencer's perception of either alternative punishment is distorted. Thus, if the perceived alternatives are death or no punishment at all a capricious determination might result as suggested in Woodson v. North Carolina (1976) 428 U.S. 280, 302-303. On the other hand, if the perceived difference in alternative punishments is minimal (e.g., death or lifelong torture) a careless decision may result.

The California statute clearly recognizes that death is a more severe

punishment than life imprisonment without the possibility of parole since the death penalty may be imposed only if the trier of fact finds aggravating circumstances outweigh mitigating circumstances. (Pen. Code, § 190.3.) On the other hand, it has been recognized that there are some persons who would rather die than languish in prison for a lifetime. (Furman v. Georgia, supra, 408 U.S. 238, 345-346 (Marshall, J. concurring).) It is reasonable to suppose that some jurors might share that belief to the extent it would distort the deliberative process.

The alternative punishment of confinement in state prison for a term of life without possibility of parole prescribed in Penal Code section 190.3 is misleading in the sense that it connotes perpetual imprisonment with no hope of consideration for release. California Constitution, Article V, section 8,

provides for the power of pardon and commutation by the Governor. Penal Code section 4801 empowers the Board of Prison Terms to report to the Governor the names of prisoners, who, in the judgment of the Board, should have their sentences commuted. Title 15, section 2817 of the California Administrative Code provides for Board review of the cases of prisoners serving sentences of life without possibility of parole with a view toward making a recommendation to the Governor. In a recent California case where the penalty of life imprisonment without possibility of parole was claimed to be cruel and unusual the Court of Appeal pointed out:

> ". . .The punishment of life imprisonment without possibility of parole is not as awesome or as comprehensive as pointed out by appellant. He is not without recourse and the penalty is not tantamount to spending the rest of his life behind bars. Available

> is the Governor's power of commutation (Art. V, § 8, Cal.Const.), procedures for commutation of a prisoner sentenced to life imprisonment without possbility of parole (§§ 4800-4814, Pen. Code) and the liberal policies therefore set out in title 15, California Administrative Code." (People v. Noble (1981) 126 Cal.App.3d 1011, 1018-1019 [179 Cal.Rptr. 302].)

Therefore it is reasonable to conclude that informing the jury a sentence of life imprisonment without the possibility of parole may in future be modified so as to include the possibility of parole removes a distorting factor which might otherwise be present. This is particularly true in view of the likelihood that some substantial number of potential jurors will already be aware of that fact.

Finally, it is reasonable for the state to conclude that its jurors will be true to their oaths and follow

the court's instructions irrespective of the fact that they know the defendant might possibly be paroled some day if he is not sentenced to death.

In a pre-Furman case where sentencing was totally discretionary there may have been a risk such information would assume unwarranted importance. However, under the California statute the jury is given detailed guidance as to matters to consider regarding both the offense and the character and record of the defendant, and permitted to impose the death penalty only on a finding that aggravating circumstances outweigh mitigating circumstances. The latter directive is so positive and clear that it would be an obvious violation of a juror's oath to render his penalty decision on factors other than his assessment of the aggravating and mitigating circumstances. Thus the likelihood that knowledge of the

possibility of parole will assume undue importance is minimal if it exists at all.

Due process of law requires the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. (Snyder v. Massachusetts (1934) 291 U.S. 97, 116.) The constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected. (McGautha v. California (1971) 402 U.S. 183, 221.)

Recent decisions of this Court require that sentencing discretion in capital cases is channeled so that arbitrary and capricious results are avoided. (Hopper v. Evans (1982) ____ U.S. ____, 102 S. Ct. 2049, 72 L.Ed.2d 367, 373.) In Beck v. Alabama, supra, 447 U.S. 625 a procedure which

prohibited instructions on lesser included offenses when the evidence would support them was held unconstitutional. (Id., at p. 638.) In Lockett v. Ohio (1978) 438 U.S. 586 it was held unconstitutional for the sentencer to be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffered as a basis for a sentence less than death. (Id., at p. 604.) Clearly, neither of those cases have any application to the California procedure.

Gardner v. Florida (1977) 430 U.S. 349 provides an instructive contrast to this case. In Gardner the jury found mitigating circumstances outweighed aggravating circumstances and advised the court to impose a life sentence. The

trial judge ordered a presentence report containing a confidential portion which was not disclosed to defense counsel. He imposed a sentence of death and recited that he had reviewed the information contained in the presentence investigation. The record on appeal did not include the confidential portion of the presentence report. (Id., at pp. 352-354.) This Court concluded that the defendant was denied due process when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain. (Id., at p. 362.) In contrast, the information provided to the jury under the California procedure is information already known to the defendant, his counsel and the sentencing judge, and which is indisputably correct and fully set forth on the record.

The one discernible disadvantage to the defendant in the instruction required by the California procedure is to preclude him from the tactical decision to argue to the jury that if the defendant is not sentenced to death he must inevitably spend the rest of his life in prison. Such an argument would be false, and no defendant, including one who has been convicted of murder of the first degree and the special aggravating circumstances which subject him to the death penalty, has any constitutional right to attempt to pervert justice in this fashion.

It has been observed that there is no perfect procedure for deciding in which cases governmental authority should be used to impose death. (Lockett v. Ohio, supra, 438 U.S. 586, 604.) The State of California does not suggest that

the constitution requires an instruction such as that prescribed in the California statute. However, California's decision to require that instruction by statute is entirely reasonable and does not impinge on any federal constitutional rights of a defendant.

II

THE STATUTE IS NOT INVALID BECAUSE OF FAILURE TO REQUIRE AN INSTRUCTION REGARDING THE POWER TO COMMUTE THE DEATH SENTENCE

The California Supreme Court's holding that the required instruction is misleading because it does not inform the jury of the power to commute a death sentence (People v. Ramos, supra, 30 Cal. 3d 553, 597-598) appears unique. It is significant that in his motion to delete the instruction defense counsel at trial did not suggest as an alternative that the jury be instructed as to the possible

commutation of the death sentence. (JA 12-22; CT 665-671.) It appears doubtful that any defense counsel at trial would make such a suggestion.

In People v. Morse, supra, 60 Cal.2d 631 the California Supreme Court had reached the opposite conclusion. Although finding it proper to instruct the jury regarding parole (Id., at pp. 647-648) the court disapproved instructions regarding the power of the trial judge or the Governor to reduce a death sentence to life imprisonment. (Id., at pp. 649-652.) In ruling on the latter point the court observed:

> "We believe that the instruction that the trial judge has the power to reduce a death penalty to a sentence of life imprisonment may very well induce the jury to assume that its finding for the death penalty merely initiates a series of procedures which invoke a reconsideration of the pen-

> alty and which may result in its reduction to life imprisonment.
>
> "Since the jury undertakes the task of assessing the penalty in the wide latitude of absolute discretion and in the absence of statutory guidelines, the suggestion that higher authorities will review its decision must profoundly affect it. Upon the delicate scale of unbounded determination we add a new but definite weight. The impact of the instruction must necessarily weaken the jury's own sense of responsibility. Yet nothing should be introduced to the jury to detract from its most careful consideration of the choice of penalty. That effort should not be adulterated by the infusion of foreign and deflecting factors." (Id., at p. 649.)

The risk that the jury will impose an erroneous death penalty because of a weakened sense of responsibility is obviously less where the jury is given specific guidelines than under the system existing in Morse where the jury exercised

absolute discretion. Nonetheless, the conclusion that informing the jury, in effect, that an erroneous death penalty determination may be corrected at a later time might tend "to diminish the reliability of the sentencing determination." (Beck v. Alabama, supra, 447 U.S. 625, 638.)

The California Supreme Court finds the failure to instruct the jury misleading because it only tells half the story. (People v. Ramos, supra, 30 Cal.3d 553, 597.) However, the "story" which is the subject of the required instruction is not the power of the Governor or the power of commutation in general. Rather, the sole and legitimate purpose of the required instruction is to avoid misconception as to the legal effect of a term of imprisonment for life without the possibility of parole.

There appears no conceivable benefit to a defendant in informing a penalty jury that if it imposes the death penalty the penalty may be modified, whether by the trial judge, an appellate court or the executive. Neither would such information appear to have any tendency to increase the reliability of the sentencing determination. Certainly, the Constitution does not prohibit a state from making that conclusion.

III

NO DENIAL OF DUE PROCESS RESULTED FROM THE REQUIRED INSTRUCTION IN THIS CASE

The effect of any procedure must necessarily be viewed in light of the facts of the case. The facts in this case compel the conclusion that respondent planned in advance not only a robbery but also a double murder of the innocent

robbery victims. Having decided to commit a robbery he chose not to rob strangers but chose to rob his fellow employees who could obviously identify him and cause his arrest. He used his position as an employee to get behind the counter of the restaurant. (RT 324-326.) After respondent displayed the gun and convinced the victims he was not joking they were entirely cooperative and made no resistance. They were meekly herded into the cooler, told him where the keys to the safe were and did just what he told them to do. (RT 328-329, 331-332, 336, 341, 353, 355-356.) Before he shot them respondent ordered the victims to kneel against the back wall and they did so. When Kevin Pickrell begged respondent not to hurt them he laughed. He told them to say their prayers and shot them both in the head.

(RT 357-362.) After he had been arrested respondent was overheard boasting about what a "trip" it was and how the victims had been on their hands and knees begging for their lives before he shot them. (RT 731-732.)

There was, of course, evidence offered in mitigation at the penalty phase. Respondent had no prior criminal record, he had had an extremely unfortunate childhood and was of relatively low intelligence. (RT 774-779, 792-800, 1069, 1076-1078.) Respondent admitted shooting both victims but claimed he did not intend to kill them. (RT 834-854, 877, 900.) A defense psychiatrist offered an explanation of the murder generally in terms of respondent's pre-existing inadequacies and the situation at the time of the robbery. (RT 959, 992-1001.)

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The first reference to the possibility of parole was in cross-examination of the defense psychiatrist. That was in the context of the inquiry whether in any of the interviews on which the psychiatrist had based his opinion respondent had indicated any feeling of wanting revenge. (JA 24-25; RT 1051-1052.) Defense counsel's objection was overruled and his motion to strike denied. (RT 1053-1054.) In further cross-examination the psychiatrist testified respondent had indicated he knew the Governor could commute a sentence of life without parole but did not want false hope and would prefer the death penalty; also that if he should be paroled in 20 years he might want revenge on the judge, jury and various others. (RT 1055-1056.)

The prosecutor made two brief references to the possibility of parole in his lengthy argument, including one

reference when he was reading the proposed instructions. (JA 26-28; RT 1098, 1110-1111.)

Defense counsel raised the subject somewhat more extensively in his argument (JA 29-32; RT 1161-1162) in the context of the argument that the jury could only justify imposition of the death penalty if they found it was necessary (RT 1159-1162).

The jury was fully instructed as to all the factors set forth in Penal Code section 190.3, and further instructed they could not return the penalty of death unless they found beyond a reasonable doubt that aggravating circumstances outweighed mitigating circumstances. (JA 33-40; RT 1187-1191.) The jury retired for deliberations at 11:30 a.m. and returned its verdict at 4:00 p.m. that same day. (RT 1191, 1193.)

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In ruling on the motion for modification of the verdict the trial judge discussed the specified factors at length and concluded that the factors in aggravation greatly outweighed any factors in mitigation. (RT (Pronouncement of judgment) 6-14.)

This Court has held that because of the uniqueness of the death penalty sentencing discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. (Gregg v. Georgia, supra, 428 U.S. 153, 188, 189.) It logically follows that a defendant need not and should not be permitted to conceal facts relevant to the sentencing determination.

The fact that respondent was aware of the possibility of parole and had indicated to the defense psychiatrist, months after the offense, that if re-

leased he might seek revenge on other innocent persons was highly relevant in assessing the psychiatrist's opinions as to the dynamics of the offense and respondent's character. Obviously, concealing that information from the jury could not make its determination more reliable. It is equally obvious there was no unfairness in permitting the jury to have that information, which was relevant irrespective of the possibility of parole eligibility at some time in the future.

Although the prosecutor briefly mentioned the instruction regarding possibility of parole in going through all the instructions he did not suggest the jury should render a verdict of death for that reason but instead asked the jury to follow the law (RT 1116) and argued how each of the specified factors related to the evidence (RT 1117-1156).

Although defense counsel did raise the subject of possible parole in his argument that argument was not required either by the instruction or the prosecutor's argument. Instead, it was germane only because of the tactical choice to urge that the jurors should make their own determination of necessity rather than weighing the aggravating and mitigating circumstances. Absent the instruction defense counsel might have been able to argue that respondent would inevitably spend all the rest of his life in prison if not sentenced to death, but that would not have been true.

The instruction in this case did not deny respondent any fundamental right and there is not the slightest indication that either the jury which returned the verdict of death or the judge who denied the motion for modifi-

cation and pronounced sentence violated their oaths or were in any way misled to respondent's prejudice. The sentencing proceedings were eminently fair and in no way likely to lead to an arbitrary or capricious result.

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CONCLUSION

For all the foregoing reasons petitioner State of California respectfully requests that the judgment of the California Supreme Court be reversed insofar as it reverses the penalty of death and that the cause be remanded to that Court for further proceedings.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General

ROBERT PHILIBOSIAN
Chief Assistant Attorney General
Criminal Law Division

DANIEL J. KREMER
Assistant Attorney General

JAY M. BLOOM
Deputy Attorney General

Harley D Mayfield

HARLEY D. MAYFIELD
Deputy Attorney General

Attorneys for Petitioner

HDM:np
11/5/82
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CALIFORNIA STATUTE

PENAL CODE

§ 190.2

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall

be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver,

or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

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(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

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(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the

local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscience-

less, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral Copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

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§ 190.4

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special

circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the

finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special

circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of

fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026,

the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the

defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of a death penalty verdict

pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

GEORGE DEUKMEJIAN
Attorney General
State of California
HARLEY D. MAYFIELD
Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101

PEOPLE OF THE STATE
OF CALIFORNIA,
Petitioner,

v.

MARCELINO RAMOS,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF ON THE MERITS of 5 NOVEMBER 1982 as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

State Public Defender
1390 Market Street, Suite 425
San Francisco, CA 94102
Attn: Ezra Hendon
Deputy State Public Defender

Court of Appeal
Fourth Appellate District
Division Two
303 West Third Street
Room 640
San Bernardino, CA 92401

Cecil Hicks
District Attorney
County of Orange
P.O. Box 808
Santa Ana, CA 92702

Lee A. Branch, Clerk
County of Orange
P.O. Box 838
Santa Ana, CA 92702
FOR DELIVERY TO THE HON.
R.J. BEACOM, JUDGE

California Supreme Court
350 McAllister Street, Room 4050
San Francisco, CA 94102

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I declare under penalty of perjury that the foregoing is true and correct.

DATED: 16 Day of November
1982, at San Diego, California.

Clifford E. Reed

CLIFFORD E. REED, JR.

Respondent's Brief

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FILED
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CLERK

No. 81-1893

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CALIFORNIA, *Petitioner*,

v.

MARCELINO RAMOS, *Respondent*.

On Writ Of Certiorari To The Supreme Court Of California

BRIEF FOR RESPONDENT

EZRA HENDON
Deputy State Public Defender
1390 Market Street, Suite 425
San Francisco, California 94102
Telephone: (415) 557-1600
(Court-appointed Attorney for Respondent)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether an instruction which informs a California jury at the penalty phase of a capital case that the Governor may commute any sentence of life without possibility of parole that it may impose, but does not disclose to the jury that the Governor may also commute any death sentence it may impose (a) injects a constitutionally unacceptable level of uncertainty and arbitrariness into capital jury sentencing; or (b) deflects the jury from its constitutional responsibility to impose the sentence called for by the facts of the offense and the character of the offender; or (c) misleads the jury as to the effect and consequences of its sentencing decision.

2. Whether this Court ought to disturb the California Supreme Court's conclusion that the federal constitutional error committed where the instruction referred to above was given could not, on the facts of this case, be deemed harmless.

3. Whether this Court should reach the merits of federal claims decided by a state court where the state court has held there exists a serious error of state law, but has not directly passed on whether such error is sufficiently prejudicial by itself to support the state court's judgment of reversal.

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RESPONDENT'S BRIEF ON THE MERITS

The portions of Petitioner's Brief on the Merits covering the opinion below and the jurisdiction of this Court are hereby adopted by respondent.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions noted in Petitioner's Brief on the Merits, this case involves the following statutory provisions, copies of which have been lodged with the Clerk's Office:

1. California Evidence Code section 352.
2. California Penal Code sections 4800-4906.

SUPPLEMENTAL STATEMENT OF THE CASE

1. Procedural History

Respondent adopts the procedural portions of the Statement of the Case in Petitioner's Brief on the Merits at pages 3-5, and supplements that statement with the following information showing how the issue of commutation was handled at trial and how the California Supreme Court acted regarding the instruction prior to its decision in this matter.

On December 20, 1979, counsel moved to preclude the giving of any instruction on the power of the Governor to commute a life without parole sentence, and filed a lengthy memorandum in support of the motion. (JA 12-22; CT 6[illegible]-671.) He reiterated his position orally before the trial court and the court denied his motion. (JA 23; RT 718.)

During cross examination of defense expert witness Dr. Sheffner, the District Attorney on his own and without the question of commutation having been raised by defense counsel asked: "Was, in your estimate, Mr. Ramos aware that in a situation of life without parole the governor would be able to commute the sentence to life and that that would envision parole?" (JA 24; RT 1052.) Defense counsel then asked for a bench conference at which he put on the record that "I don't

want that last question and answer to be taken as a waiver of my objection to the jury instruction" and made a motion "to strike [the testimony] about [the defendant's] knowledge of commutation." (RT 1053.) The motion was denied.

During closing argument the prosecutor told the jury that "life without parole . . . does not quite mean that" (JA 26; RT 1098). He informed the jury that "the judge tells you something, which the doctor has already indicated Mr. Ramos is aware," (JA 27; RT 1110) after which he proceeded to read the entire commutation instruction to the jurors.

After his efforts to keep the issue of commutation from the jury failed, defense counsel was forced to deal with commutation in his own argument. He argued the California penal system was an advanced one, that life without parole *did* mean what it implied and that no California governor would pardon Mr. Ramos or commute his sentence. (JA 29-32; RT 1161-1162).

The jury was instructed at the end of the penalty phase that it should apply all the instructions it was given unless expressly told not to (JA 34). It was advised that the governor of California could commute any life without parole sentence it might impose (JA 37), and was nowhere told not to consider that commutation instruction.

On April 29, 1981, some 8-1/2 months prior to issuing its opinion in this case, the California Supreme Court took the unusual step of making public a letter addressed to counsel in the *Ramos* case and "all other interested parties." The letter inquired as to the parties' views of the power of the California Supreme Court to stay the giving of any commutation instruction in trial courts throughout California pending decision in the *Ramos* case itself. (JA 3-4.)

2. Facts Relating To Penalty

The evidence admitted at the guilt phase has been set forth in the California Supreme Court Opinion (Appendices to Petition for Certiorari (hereinafter "App") at A-5-A-10; 30 Cal.3d

553, 563-564). Because the issues in this case relate solely to penalty, and because the California Supreme Court's statement of the facts pertinent to the guilt phase is complete, respondent respectfully refers this Court to that statement.

David G. Lam testified for the prosecution that he was in custody at the Orange County Jail in June, 1979, for felony nonsupport of his own children, and was released at the end of June after his conviction for nonsupport (RT 729-730; 733). He stated that one day while waiting in the hallway to go to court, he observed respondent in front of him chained with two other men. There were approximately 50 to 100 people in the hallway, and most of them were talking. There were between five and eight people between Lam and respondent. Under these noisy and crowded conditions, Lam claimed to have overheard bits and pieces of a conversation in which respondent was supposed to have said that he enjoyed watching the victims on their hands and knees before he shot them. (RT 729-733; 739-740.) Lam admitted that he did not pay close attention to the conversation; (RT 734) and that he did not know everything respondent had allegedly said; that he did not even know the charges respondent was facing; (RT 743) and that since almost seven months had elapsed between the time he heard this supposed conversation and the trial he was unable to recall respondent's exact words (RT 749).

Two other prosecution penalty phase witnesses testified to the issuance and execution of a search warrant for the apartment respondent occupied and identified weapons and writings found there, including a letter to respondent's brother and a document entitled "Last Will and Testament." (RT 760-764.).

Defense testimony consisted of nine witnesses. These included respondent's aunt, who testified concerning respondent's home and family life in San Antonio, Texas, where he was raised; his brother who also spoke of Marcelino's upbringing, his unusual suggestiveness, and the bad influence that Ruben Gaitan, respondent's co-defendant exercised on him; and various relatives, friends and church members from San Antonio. Evidence was also heard concerning respondent's

psychiatric make up, his problems, and his drug and alcohol abuse. Respondent himself testified at length. From this evidence the following picture emerged.

Respondent, who was about 21 at the time of the offense, had no prior criminal record and had never been arrested before. He was the adopted son of two parents of Mexican extraction and was raised in a lower class neighborhood in San Antonio, Texas. When he was eight years old, respondent's father died. When he was 13 or 14 years old, his mother also died. Respondent had an older brother, Mario, who at that point was about 16 years old. The only supervision that was available or provided for respondent after he was orphaned was from a maternal aunt, Mary Gonzalez. Although Ms. Gonzales checked on respondent and his brother on a regular basis, they did not live with her. Instead, Marcelino and his 16 year old brother remained together living alone in their home in San Antonio. (See RT 775-782; 792 et seq.)

As might be expected, the change in respondent's life as result of being orphaned was dramatic. Before being orphaned, respondent regularly attended a San Antonio church called La Luz Del Mundo. After his mother died, respondent ceased going to La Luz Del Mundo. Schooling followed the same pattern. He attended regularly before his mother died, but only irregularly thereafter (RT 775-782).

Respondent's brother testified as to the difficulties he, as an adolescent older brother, had controlling and directing the behavior of his younger brother Marcelino after the death of their mother. He too spoke of the dramatic and drastic change that occurred in Marcelino when their mother died. He testified to the fact that Marcelino's church and school attendance became erratic and also that about that time Marcelino came under bad influence, the chief among whom was Rubin Gaitan (RT 792-793).

According to Mario, Ruben dominated Marcelino throughout their relationship. Ruben could read; Marcelino's reading skills were very poor, and Ruben would read books about

terrorism and weapons which he then explained to respondent. (RT 795-796.) The ideas and even the events in the documents seized from respondent's room were complete reflections of the thinking and life of Ruben Gaitan, not of Marcelino. (RT 797-800.) Mario Ramos was certain that anything that happened on the night of the crime would reflect Gaitan's leadership. (RT 803-808.)

Respondent's difficulties in dealing with the trauma of orphanage were exacerbated by profound feelings of inadequacy and inferiority. Respondent had an IQ of about 75, had congenital brain damage and was a borderline schizophrenic. He had very limited reading abilities, and was unable to handle anything but the most menial tasks. His attempts to enroll at and stay with school were similarly unsuccessful as were numerous other efforts to hold jobs. (See, e.g., RT 813-816, 817-820.)

Respondent testified as to his background, his difficulties at finding jobs, the influence of Ruben Gaitan on his life, his move to California, and his involvement in the present offense. He admitted to participation in the robbery and, after trying at first to shield Gaitan from culpability, he admitted that Gaitan participated with him (RT 916-919.) He stated he had ingested alcohol and amphetamines before the robbery and also testified that at the time of the offense he had become a heavy user of both drugs and alcohol. Respondent told the jury about how nervous he was throughout the incident, how he had to go to the bathroom to wash his face so that he could get control of himself and about his continuing internal debate about whether to go through with the robbery. (RT 841-843; 882-883.) He also testified that he hit the victims over the head with piping in order to knock them out before shooting them and further testified that his intentions were to graze them with the bullets and not to shoot them. (RT 851-854.)

Evidence introduced at the penalty phase established that the weapon used in the robbery and shootings belonged to Gaitan and that respondent had purchased it for Gaitan at Gaitan's suggestion. (RT 947-949.)

Dr. David J. Sheffner, a psychiatrist certified by the American Board of Psychiatry and Neurology, and an Assistant Professor of Psychiatry at the University of California, Irvine, Medical School, testified for respondent. After an extensive review of the record, test reports and interviews, Dr. Sheffner gave his opinion that respondent had an "inadequate personality . . . tremendously inadequate in virtually most areas by which you measure personality functioning, intellectual functioning, social functioning, work functioning." (RT 970.) This inadequacy was a function of brain damage and of respondent's social and economic background. In Dr. Sheffner's opinion respondent is a borderline schizophrenic personality. This manifests itself in a failure to distinguish clearly between external and internal reality, exhibited in Mr. Ramos' feeling that he is specially chosen by the PLO who are sending him secret messages (RT 970-972.)

During cross examination of Dr. Sheffner the District Attorney elicited testimony over defense objection that Mr. Ramos might in the future harbor feelings of revenge toward the participants in the trial, including the jurors (RT 1051-1054). The District Attorney also asked:

> "Was, in your estimate, Mr. Ramos aware that in a situation of life without parole the governor would be able to commute the sentence to life and that that would envision parole?" (JA 24; RT 1051-1052.)

SUMMARY OF ARGUMENT

The requirement of the so-called Briggs Initiative that California juries sitting in the penalty phase of a capital case be told of the power of the Governor to commute a sentence of life without parole injects a constitutionally impermissible level of arbitrariness and unreliability into the jury's sentencing decision. Commutation considerations also deflect California capital sentencing juries from performing their constitutionally mandated responsibility to make penalty decisions in accordance with the character of the offender and the nature of his offense. In California executive clemency can be exercised by

the Governor on almost any basis he sees fit. It has historically been exercised by California Governors in unpredictable ways. The special need for reliability in capital cases is not met when jurors are permitted to base sentences in whole or in part on a power so broad in its scope and so erratic in its exercise. For these reasons almost all jurisdictions that have considered the question in modern times have prohibited jurors from consideration of commutation or parole in sentencing.

In addition the present California statute is constitutionally defective because it creates a misleading impression for the jury of the nature of commutation. It does this by advising the jurors the Governor can commute one of the jury's sentencing choices—life without parole—but not advising them he can also commute the other choice—death. The instruction thus wrongly implies to the jurors that if they find the defendant unfit to return to society they can only prevent his getting out of prison by sentencing him to death. A jury so fundamentally misled about the nature and effect of its decision cannot constitutionally sentence a defendant to death. The California Supreme Court's determination that the error in this case was not harmless was entirely correct and is fully supported by this record.

Under long standing principles, this Court must be assured that the federal questions tendered to it were necessary to the determination of the cases for it to assert jurisdiction. On this state of the record petitioner has not met his burden to provide that assurance. At footnote 22 of its opinion, the California Supreme Court ruled the trial judge had committed error under California Evidence Code section 352 in admitting certain highly prejudicial evidence in the penalty phase of the trial. However, because the California Supreme Court purported to base its decision to reverse the death judgment on the federal Constitution, it did not decide whether the error of state law was sufficiently grave to warrant reversal of the penalty independent of any federal constitutional considerations. Because of the seriousness of the error, the California Supreme Court would almost certainly reverse on the state

law ground if the matter were remanded for its reconsideration. This Court's jurisdiction over the federal questions presented here is therefore insecure and *certiorari* should accordingly be dismissed or the matter should be remanded to the California Supreme Court so it can assess the adequacy of the state ground.

ARGUMENT

INTRODUCTION

California law contains a unique and almost universally condemned requirement that jurors faced with the task of deciding the appropriate punishment in the penalty phase of a capital case be told they may consider the power of a California governor to commute one of the two sentencing choices open to the jury. This requirement was added to the California Penal Code by the so-called Briggs Initiative,[1] and provides:

> "The trier of fact [in the penalty phase of a capital case] shall be instructed that a sentence of confinement to state prison for a term of life without the possibilty of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California." (Pen. Code, § 190.3 par. 5.)

The jury in this case was instructed in accordance with the statute, the District Attorney utilized the possibility of commutation of a life without parole sentence in argument to

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[1] The Initiative which was passed in 1978 amended the Penal Code in a variety of ways, which were designed to make it procedurally easier to obtain verdicts of death and to expand the range of conduct which made a defendant death-eligible. The effect of the Initiative is summarized at footnote 22, *infra*. The Initiative is popularly known as the "Briggs Initiative" because its principal sponsor was former State Senator John Briggs, and the instruction at issue in this case is commonly referred to as the "Briggs Instruction." (See, e.g., App. A-3; 30 Cal.3d at 562-563.)

the jury and during cross examination of defense witnesses, and defense counsel was forced to defend against the issue of commutation in his argument.

In the argument that follows respondent demonstrates that the Briggs Instruction suffers from a variety of constitutional defects. We show *first* that the instruction injects a constitutionally unacceptable level of unreliability and arbitrariness into the sentencing decisions of juries in capital cases. *Second*, we show how a jury left free to consider commutation in deciding the appropriate penalty in a capital case is necessarily deflected from its constitutionally mandated task to base the sentence on the character of the defendant and the nature of his or her offense. And, *third*, respondent shows that the way in which jurors are selectively informed by the Briggs Instruction of the Governor's power to commute any life without parole sentence they may impose but are not told of the Governor's power also to commute any death sentence they may impose leaves them fundamentally misled about the nature of their function and the effect of their decision. Respondent also addresses briefly petitioner's harmless error argument (see Petitioner's Brief on the Merits, at pp. 58-66).

This brief concludes by pointing out that there is a serious jurisdictional obstacle to this Court's reaching the merits of the federal claims tendered by the petition for *certiorari* because in fact there exists a state ground which is adequate to support the judgment of the California Supreme Court.

ARGUMENT

I

ALLOWING JURORS TO SENTENCE TO DEATH ON THE BASIS OF THE POWER OF THE GOVERNOR TO COMMUTE SENTENCES IS ALMOST UNIVERSALLY CONDEMNED AND IN CALIFORNIA IT INJECTS A CONSTITUTIONALLY UNACCEPTABLE LEVEL OF UNRELIABILITY INTO THE CAPITAL SENTENCING PROCESS, AND DIRECTS JURORS AWAY FROM CONSIDERATIONS OF THE DEFENDANT'S CHARACTER AND HIS OFFENSE

The commutation power of the Governor of California is essentially without substantive limitation. Because it is peculiarly a prerogative of the Executive Branch, its exercise depends upon the Executive's uniquely political perception of the public good, a perception which can be different from justice in the individual case. Because of the breadth and judicial nonreviewability of the Governor's power to commute sentences in California, it has historically been exercised in death cases in an unpredictable manner and on an inconsistent basis. Any jury's attempt to account for or apply a power so broad and so unpredictably exercised in the sentencing phase of a capital case, skews the jury's decision beyond constitutionally acceptable limits.

The provision of the Briggs Initiative which instructs California juries on the issue of commutation in death cases is unique. Any decision of this Court affirming the California Supreme Court's invalidation of that provision of the Initiative will therefore have an extremely limited impact on capital sentences in other jurisdictions.[2] Because this Court has in the

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[2] Indeed, even in California such a decision would have only a limited impact. While no exact figures are available it is clear that the statement of Justice Richardson in dissent below that the California Supreme Court's decision in this case would require "reversal of every [California] death sentence heretofore imposed in jury trials

past allowed the judgments of the various states to "weigh heavily in the balance" (*Enmund* v. *Florida*, ___ U.S. ___, 73 L.Ed.2d 1140, 1151 (1982)), in assessing whether a given procedure passes constitutional muster,[3] we first survey the attitudes of state legislatures and courts toward permitting juries to consider future modification of a jury's sentence by commutation or parole.

A. The Overwhelming Weight Of State Authority Prohibits Jurors From Consideration Of Future Commutation Or Parole In Sentencing

Petitioner's assertion that "[t]here is . . . a difference of opinion among the states on the question whether penalty phase jurors in capital cases should be informed of parole" masks both the nature of the inquiry in this case and the true state of the law. The question here is not whether jurors can *know* about parole, but whether they can *consider* parole in imposing a death sentence. As we see later, the California Supreme Court has authoritatively construed the California statute to put the question of commutation before the jury for its consideration. Indeed, no other conclusion is possible on this record and in light of the history of the California

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which have been conducted under the 1978 law" (App. A-134; 30 Cal.3d at 602, emphasis deleted) is an exaggeration. First, almost all trial courts throughout the state stopped giving the instruction after April 29, 1981, when the California Supreme Court took the unusual step of making public a letter inquiring as to its power to enjoin the giving of the instruction pending decision in *Ramos* (JA 3-4). Second, even before the April, 1981 letter, many District Attorneys asked that the instruction not be given evidently because of concern about its constitutionality.

[3] See, e.g., *Enmund, supra; Beck* v. *Alabama*, 447 U.S. 625, 637 (1980); *Coker* v. *Georgia*, 433 U.S. 584, 592-96 (1977); *Gregg* v. *Georgia*, 428 U.S. 153, 179-82 (1976); *Woodson* v. *North Carolina*, 428 U.S. 280, 294-99 (1976).

commutation instruction. As we also see, the question whether a jury should be told of future commutation or parole and then instructed to disregard these factors raises no constitutional question before the Court in this case.

The propriety of allowing a sentencing jury in choosing the appropriate sentence to consider the power of a Governor to commute the sentence or of a parole board to modify it has been squarely considered in 27 jurisdictions. Petitioner's characterization of the resolution of that question as a "difference of opinion among the states" fails to convey an accurate sense of the consensus on the subject. A careful reading of the law in all jurisdictions which have passed on the subject reveals that 23 of these 27 states have adopted the position that the jury should not consider pardon, parole or commutation. Three jurisdictions have held that such consideration is proper, but of those three, two have not considered the question in the last 45 years, and in the one remaining jurisdiction the jury only recommends the sentence. In one jurisdiction the answer is ambiguous. It is therefore safe to say that the modern judgment among the states is that a jury may not consider future parole or commutation in passing sentence.

1. State statutes

Respondent's research has disclosed that California is the only state which has a statute which requires that an instruction be given that the jury may consider commutation. In one state, Georgia, the instruction is specifically prohibited by statute (Ga. Code Ann. § 27-2206) and in the one other state which did provide for an instruction on parole, Tennessee, the statute was invalidated by the Tennessee Supreme Court. (See *Farris* v. *State*, 535 S.W.2d 608, 614 (Tenn. 1976) (discussed *infra*).

In every other jurisdiction, the issue has arisen either because the jury inquired about parole or commutation or because the defendant contended the prosecution improperly argued the issue.

2. State case law

a. In 23 states juries are not permitted to consider the issue of gubernatorial commutation or possible future parole in deciding punishment:[4]

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[4] The following listing contains all jurisdictions which have passed on the question whether it is proper for a jury to consider commutation or parole in sentencing the defendant. Wherever possible capital cases have been used. When non-capital jury sentencing cases are cited, they are so noted. The listing also specifically indicates those cases which held it improper for the jury to consider commutation or parole, but deemed the error harmless.

Alabama: Grady v. *State*, 391 So.2d 1095, 1099-1100 (Ala. 1980) (non-capital).

Arkansas: Andrews v. *State*, 472 S.W.2d 86, 91-92 (Ark. 1971) (non-capital) Accord: *Bush* v. *State*, 550 S.W.2d 175, 176-77 (Ark. 1977); *Westbrook* v. *State*, 580 S.W.2d 702, 708 (Ark. 1979).

Colorado: Jones v. *State*, 360 P.2d 686, 694 (1961); *Sukle* v. *People*, 111 P.2d 233, 235 (1941).

Delaware: Smith v. *State*, 317 A.2d 20, 25-26 (1974) (non-capital).

Florida: Paramore v. *State*, 229 So.2d 855, 860 (Fla. 1969) (Error, but not prejudicial in this case); see also *Burnette* v. *State*, 157 So.2d 65, 70 (Fla. 1963) (Error, but not prejudicial in this case).

Georgia: Gilbreath v. *State*, 279 S.E.2d 650, 669 (Ga. 1981) See Ga. Code Ann. § 27-2206.

Illinois: People v. *Walker*, ___ N.E.2d ___, (Ill. 1982) Doc. No. 52388.

Kentucky: Blanton v. *Commonwealth*, 429 S.W.2d 407, 411 (Ky. 1968) (non-capital; harmless in this case).

Broyles v. *Commonwealth*, 267 S.W.2d 73, 75-76 (Ky. 1954) (non-capital).

Louisiana: State v. *Brown*, 414 So.2d 680, 699-701 (La. 1982); *State* v. *Lindsey*, 404 So.2d 466, 486-87 (La. 1981).

Missouri: State v. *Cornett*, 381 S.W.2d 878, 881 (Mo. 1964) See also: *State* v. *Thomas*, 625 S.W.2d 115, 127 (Mo. 1981); *State* v. *Nevels*, 609 S.W.2d 725, 728 (1980) (non-capital).

While the decisions of the various states on this subject are usually not directly based on the federal Constitution,[5] two points of federal constitutional significance must be made with

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Nebraska: Grandsinger v. *State*, 73 N.W.2d 632, 651 (Neb. 1955) (error, but harmless).

New Jersey: State v. *White*, 142 A.2d 65, 71-77 (N.J. 1958).

North Carolina: State v. *Jones*, 251 S.E.2d 425, 429 (1979) (Neither prosecution nor defendant can argue parole).

Oklahoma: Evans v. *State*, 541 P.2d 269, 272 (Okla. Cr. App. 1975) (non-capital).

Oregon: State v. *Leland*, 227 P.2d 785, 794-96 (Ore. 1951).

Pennsylvania: Commonwealth v. *Aljoe*, 216 A.2d 50, 52 (Pa. 1966). See also *Commonwealth* v. *Johnson*, 81 A.2d 569, 572-73 (Pa. 1951).

South Carolina: State v. *Atkinson*, 172 S.E.2d 111, 112-13 (S.C. 1970). See also *State* v. *Goolsby*, 268 S.E.2d 31, 39 (S.C.), *cert.* denied. 449 U.S. 1037 (1980) (error cured by subsequent instructions).

Tennessee: Farris v. *State*, *supra*, 535 S.W.2d 608, 613-14 (Tenn. 1976) (non-capital).

Texas: Clanton v. *State*, 528 S.W.2d 250 (Tex.Cr. App. 1975); *Alejandro* v. *State*, 493 S.W.2d 230, 231 (Tex. Cr. App. 1973) (non-capital).

Virginia: Jones v. *Commonwealth*, 72 S.E.2d 693, 694-97 (Va. 1952) see also *Hinton* v. *Commonwealth*, 247 S.E.2d 704, 705-07 (Va. 1978) (non-capital); *Clanton* v. *Commonwealth*, 286 S.E.2d 172, 178-79 (Va. 1982).

Washington: State v. *Todd*, 474 P.2d 542, 548-51 (Wash. 1970).

West Virginia: State v. *Lindsey*, 233 S.E.2d 734 (W.Va. 1977) (non-capital).

Wyoming: State v. *Carroll*, 69 P.2d 542, 558-64 (Wyo. 1937) (rule established for future prohibiting consideration of parole or commutation).

[5] But see *People* v. *Walker*, *supra*, ___ N.E. 2d ___ (Ill. 1982) (Doc. No. 52388); *State* v. *Lindsey*, *supra*, 404 So.2d 466, 486-87 (La. 1981).

regard to these decisions: first, near universality of the recognition that it is improper for a sentencing jury in a capital case to consider as part of its decision the possibility of future commutation or parole should "weigh heavily" with this Court; second, as we will see in greater detail, the decisions of the states are in fact based on constitutionally recognized considerations such as the need for reliability, the need to focus on the defendant and his crime, and the need for jury responsibility in sentencing.

b. In one jurisdiction, Nevada, the answer is ambiguous.[6]

c. In only three jurisdictions has it been deemed proper to allow a jury to consider that a death or life sentence can be reduced by commutation or parole. Two of the cases are more than 45 years old and either rely on authorities from other states which have subsequently overruled those decisions,[7] or do not cite any authority whatever.[8] Only *Brewer* v. *State*, 417 N.E.2d 889 (Ind. 1981) among post-*Furman* cases permits

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[6] In Nevada the jury chooses between death, life without parole and life with parole in a capital case (Nev. Rev. S. 200.030(3)). *Sumners* v. *State*, 467 P.2d 98, 100 (Nev. 1970) "reaffirm(s) the rule announced . . . in *Serrano* v. *State*, 84 Nev. 676, 679-80, 447 P.2d 497 (1968), concerning what the jury should be told about parole in a murder case." *Serrano* in its turn approved a charge that while a jury could be told about the effect of parole on a life sentence, it was to assume that life without parole meant exactly that and was not to consider the possibility it would be reduced.

[7] See *Sullivan* v. *State*, 55 P.2d 312, 317-19 (Ariz. 1936). *Sullivan* also relies on the fact that the then Arizona death statute "does not prescribe what jurors shall or shall not consider in the exercise of . . . discretion." (*Id.*, at 318.) Such a statute, of course, would not survive *Furman* v. *Georgia*, 408 U.S. 238 (1972).

[8] *Massa* v. *State*, 175 N.E.2d 219, 221-22 (Ohio 1930). The court in *Massa* dismisses appellant's contention that a jury charge on pardon was improper with no analysis or citation of authority and with the argument that since appellant showed his victims no mercy, he was entitled to none. Events have simply passed this case by.

juries to consider parole or commutation. That case is distinguishable because in Indiana the jury merely recommends the sentence. It is also, we respectfully submit, wrongly decided. *Brewer*, like petitioner in this case, has confused the jury's right to be *advised* of parole, with its right to *consider* parole in making its decision. (See *Brewer*, *supra*, 417 N.E.2d at 909.)

The only difference of opinion of any consequence among the states lies not in whether the jurors can consider commutation or parole, but in whether they should be informed of their existence and then instructed to disregard them. Some states have felt that juries will inevitably speculate on the existence of a commutation power or of parole and that to prevent such speculation, they should be advised either *sua sponte* or upon inquiry of the existence of commutation or parole and then told to disregard them.[9] Others have concluded that the better practice is simply not to address the subject. In these latter jurisdictions a trial judge faced with a jury inquiry on whether "life means life" is to inform the jury not to concern itself with that subject.[10] It is important to bear in mind that this case presents no issue whether the Constitution mandates one or the other of these approaches. Respondent's only contention here is that the Constitution assures that arbitrary, speculative, and unreliable factors not be *relied on* as part of the penalty decision.

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[9] See, e.g., *Burnette* v. *State*, *supra*, 157 So.2d at 70 (Fla. 1963); *State* v. *White*, *supra*, 142 A.2d at 76-77 (N.J. 1958). See also *People* v. *Morse*, 60 Cal.2d 631, 648 (1964).

[10] See. e.g., *Blanton* v. *Commonwealth*, *supra*, 429 S.W.2d at 411 (Ky. 1968); *State* v. *Brown*, *supra*, 414 So.2d at 700 (La. 1982); *State* v. *Cornett*, *supra*, 381 S.W.2d at 881 (Mo. 1964); *Hinton* v. *Commonwealth*, *supra*, 247 S.E.2d at 706 (Va. 1978); *State* v. *Copeland*, ___ S.C. ___, ___ S.E.2d ___, No. 21808, November 10, 1982, Slip Op. p. 10.

Any attempt by a jury in a capital case to rely on future commutation and parole injects a constitutionally unacceptable level of speculation and unreliability into the sentencing phase of a capital case in California.

B. A Capital Decision Made By Jurors Left Free To Rely On Possible Commutation Is Based On Unreliable And Speculative Information

1. The constitutional need for reliability in capital sentencing: The teaching of *Gardner* and *Beck*

No principle is more firmly rooted in the jurisprudence of this Court's post-*Furman* capital cases than that there is a special need to ensure that death verdicts be based on reliable, rational, and non-arbitrary factors. In the words of Justice O'Connor in *Eddings* v. *Oklahoma* "this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." ___ U.S. ___, 71 L.Ed.2d 1, 13 (1982) (concurring opinion). Justice Stewart's opinion in *Furman* itself focused on the fact that the petitioners were "a capriciously selected handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-10. And Justice White's concurrence in the same case was bottomed on the fact that the death sentences there under review provided "no meaningful basis for distinguishing the few cases in which [death] is imposed from the many in which it is not." 408 U.S. at 313.

The special need for a reliable, rational, and nonarbitrary decision in death cases has been explicitly recognized by this Court over and over again since *Furman*. See, e.g., *Woodson* v. *North Carolina*, *supra*, 428 U.S. 280, 305 (1976);[11] *Lockett* v.

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[11] "The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, *there is a*

Ohio, 438 U.S. 586, 604 (1978);[12] *Gardner* v. *Florida*, 430 U.S. 349, 359 (1977). See also *Godfrey* v. *Georgia*, 446 U.S. 420, 427, 433 (1980); *Beck* v. *Alabama*, *supra*, 447 U.S. 625, 637-38, 642, 643 (1980).

In *Gardner* this Court held unconstitutional a Florida practice of not disclosing certain information to defense counsel when the information was then relied on by the sentencing judge to impose a death sentence. The Court considered the risk too great "that some of the information accepted [by the judge] in confidence may be erroneous, or may be misinterpreted" and went on to note that "if [the information] is the basis for the death sentence the interest in reliability plainly outweighs the State's interest." (430 U.S. at 359.)

And in *Beck* this Court invalidated the Alabama procedure that did not allow jurors the option in a capital case of finding the defendant guilty of an offense between first degree murder and acquittal even where the evidence permitted such a verdict. The Court did so because it concluded that the Alabama rule "enhances the risk of an unwarranted conviction," a risk created by the fact that jurors faced with the choice of convicting someone they believed to be guilty of some serious crime or letting him go free altogether would convict in order to ensure the defendant does not escape punishment. This Court held the risk injected "extraneous factors" into the case which "diverted the jury's attention from the central issue" and "introduce[d] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." 447 U.S. at 643.

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corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (Emphasis added.)

[12] "We are satisfied that the qualitative difference between death and other penalties *calls for a greater degree of reliability when the death sentence is imposed.*" (Emphasis added.)

We will see here and in subsection B, *infra*, that the present case represents in many ways the straightforward application of the constitutional principles of *Gardner* and *Beck*. For here as in *Gardner* the sentencing authority is permitted to consider information which is unreliable and speculative. And here as in *Beck* the jury's attention is diverted from the task of determining whether *this* defendant should be condemned or spared in light of *his* crime and *his* character and record. Instead, unreliable information is injected into the process which impels the jury to in essence "oversentence" the defendant to compensate for possible commutation. In this respect, the instruction is subject to the same vice that led this Court to invalidate the Alabama practice in *Beck*.

Before examining the issue of commutation as it operates both in California and elsewhere and before we see how any effort by a sentencing jury to account for commutation necessarily skews its verdict, we dispose of a preliminary argument raised by petitioner: that California juries in general do not and this jury in particular did not consider commutation.

2. The California statute as construed by the Supreme Court of California permits juries to consider the Governor's commutation power

Petitioner appears to suggest (Brief on Merits, pp. 46-48) that California juries are not in fact free to consider the question of commutation. Rather, he argues, they are to be guided by the statutory aggravating and mitigating circumstances and are given information about commutation solely to prevent them from speculating about it and to eliminate any possible "distortion" in their thinking that life without parole means the defendant will never be paroled. The argument simply cannot be supported.

The California Supreme Court has authoritatively construed the statute to put the issue of commutation before the jury *for*

its consideration. (Appendix, A-127-28; 30 Cal.3d at 600.)[13] This Court is bound by that construction. (*Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, 688 (1959); *Guaranty Trust Co.* v. *Blodgett*, 287 U.S. 509, 513 (1933).) In addition, the California Supreme Court has also found on the record in this case that the issue of commutation was in fact put before the jury for its consideration. (Appendix A-117-A-121; 30 Cal.3d at 597-98.)[14] This finding is presumptively correct in the absence of substantial evidence to the contrary. (*Sumner* v. *Mata*, 449 U.S. 539 (1981).) There is no such evidence, substantial or otherwise, in this case.

The jury was instructed that "[i]n determining which penalty is to be imposed, you *shall consider all of* the evidence and all of *the instructions on the law* . . . except as you may hereafter be instructed." (JA-34; emphasis added.) The jury was then instructed:

> "that under the state constitution, a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime.
>
> "Under this power a Governor may in future commute or modify a sentence of life without possibility of parole to a lesser sentence that would include the possibility of parole." (JA-37.)

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[13] ". . . [T]he People argue that the Briggs Instruction serves merely to tell the jurors what they already know, and has little, if any effect on their deliberation and decision. . . . [T]he People's argument is belied by the history of the Briggs Instruction: surely, the draftsmen would not have taken the extraordinary step of commanding trial courts to give a specific instruction if they believed the instruction would have no significant effect whatsoever on the verdict."

[14] "Thus, the jurors in this case were not only misled in the abstract; they were given a very personal motive to insure that defendant was never released."

The jury was nowhere told not to consider commutation. The jury was also instructed to consider the arguments of counsel (JA-38). The District Attorney argued the commutation instruction to the jury, expressly telling it that life without parole "does not mean quite that" (JA-26) and he read the full commutation instruction to the jury. The People should not be heard to argue before this Court that the jurors were not to consider the Governor's commutation power when they urged the jurors to do precisely that at trial.

And, finally, in response to the giving of the instruction by the Court and its use by the District Attorney, defense counsel was forced to argue to the jury that life without parole did mean life without parole and that the Governor would not pardon respondent (JA-29-32).

Clearly, the California Supreme Court's finding that the jury in this considered the Governor's power to commute is supported by the record.

While respondent does not concede that the California capital sentencing scheme otherwise adequately guides jurors in arriving at their decision,[15] it goes without saying that if juror consideration of commutation was improper, the death sen-

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[15] For example, respondent believes the California scheme fails to guide the jury because it does not specify which criteria are aggravating and which are mitigating and because it allows jurors to consider nonstatutory aggravating factors. (See, e.g., *Spivey* v. *Zant*, 661 F.2d 464 (5th Cir. 1981); *Henry* v. *Wainwright*, 661 F.2d 56 (5th Cir. 1981).) There is also no requirement that the jury ever specify its reasons for sentencing the defendant to death and hence nothing providing a record of "the considerations which motivate the death sentence in every case in which it is imposed," *Gardner* v. *Florida*, *supra*, 430 U.S. at 361. The statute is defective because it fails to provide a burden of proof or to require unanimous agreement among jurors on the factor or factors relied on in sentencing to death. (See *Santosky* v. *Kramer*, ___ U.S. ___, 71 L.Ed.2d 599 (1982); *Bullington* v. *Missouri*, 451 U.S. 430 (1981).)

tence cannot stand regardless of whether the statute otherwise adequately guides the jury. In *Gardner* v. *Florida*, *supra*, the Court set aside a death sentence because the sentencing authority had utilized arguably unreliable evidence in imposing a death sentence notwithstanding the fact the Court had previously decided that the Florida statutory scheme provided constitutionally adequate guidance to the sentencer. (*Proffitt* v. *Florida*, 428 U.S. 242 (1976).)

3. Consideration of a California Governor's power of commutation by a California jury in a capital case injects an unreliable and speculative factor into the sentencing stage

In approaching the operation of the California commutation instruction, this Court must remain sensitive to the fact that California has a long history with such instructions, and that the California Supreme Court is in the best position to assess the effect and impact of that history on California juries. "Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [the Briggs Initiative] and familiar with the milieu in which that provision would operate," (*Reitman* v. *Mulkey*, 387 U.S. 369, 379 (1967)) has determined that the provision is speculative and misleading to California juries. This conclusion, informed by knowledge of California commutation practices and the history of attempts by California jurors to apply commutation in capital cases, is entitled to great weight.

Under Article V, section 8 of the California Constitution and its implementing sections in 4800 *et seq.* of the California Penal Code the Governor has almost unlimited powers to reprieve, pardon, or commute sentences subject only to the limitations that his action be taken after sentence is imposed and that he cannot commute or pardon a person twice convicted of a felony except on recommendation of four justices of the California Supreme Court. Cal. Const., art. V, § 8; Pen. Code §§ 4850-

4852.[16] In California as elsewhere,[17] "the power of the Governor to grant pardons and commutations is absolute under the constitution," *Ex Parte Kelley*, 155 Cal. 39, 41 (1908) and "is in the nature of a favor which may be withheld entirely or granted upon such reasonable conditions, restrictions and limitations as the governor may think proper." *In re Collie*, 38 Cal.2d 396, 398 (1952). California courts have been careful to respect not only the broad power of the Governor to commute, but to note the exclusive and unreviewable nature of that power. See, e.g., *People* v. *Odle*, 37 Cal.2d 52, 58 (1951); *Way* v. *Superior Court*, 74 Cal.App.3d 165, 173-76 (1977), approved in *Younger* v. *Superior Court*, 21 Cal.3d 102, 117-18 (1978).

This Court has expressed a similar view of the power of commutation. According to Justice Holmes, executive clemency is "the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." *Biddle* v. *Perovich*, 274 U.S. 480, 486 (1927). The necessity for unfettered exercise of the power of executive clemency has also been consistently acknowledged by this Court from Chief Justice Taft's opinion in *Ex Parte Grossman*, 267 U.S. 87, 121 (1925) to Chief Justice Burger's opinion in *Schick* v. *Reed*, 419 U.S. 256, 266 (1974). The clemency power has historically been exercised in this country

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[16] The distinction between pardon, commutation and reprieve in California is as follows: a pardon restores the rights of full citizenship and removes some of the disabilities which are incurred by conviction of a crime. It can be issued on account of rehabilitation or on account of innocence. (See, Pen. Code §§ 4852.01-4852.21, 4900-4906.) A reprieve is a temporary suspension of the execution of a sentence. See Pen. Code § 4800. A commutation reduces the degree of punishment by substituting a lesser for a greater punishment. See generally Meese and McInerny, "Executive Clemency" in CEB, *California Criminal Law*, 680-711 (1969) and Supp. 595-602 (1980).

[17] See generally Stafford, *Clemency: Legal Authority, Procedure, and Structure* (1977).

in light of the Chief Executive's perception of "the public welfare," often without regard to the individual case. (See, e.g., Pres. Proc. 37, 13 Stat. 758 (1865) (President Andrew Johnson's amnesty for secessionists); Pres. Proc. 4483, 3 CFR 4 (1978) (President Carter's amnesty for draft evaders).) See also *Eacert* v. *Holmes*, 333 P.2d 741, 743 (Ore. 1958). Because perception of what constitutes the public welfare will vary greatly with the particular Chief Executive, it is virtually impossible to predict how, when, or under what conditions clemency will be exercised. This is amply borne out by California commutation practices in capital cases.

An examination of the actual practices of California Governors as reflected in the annual reports submitted by the Governor to the Legislature bears out the erratic and unpredictable way it has been exercised by California Governors, as the following chart demonstrates:

Execution and Commutations of Sentences Of Death by California Governors: 1941-1979

Governor	Time Period	Executions[18]	Commutations[19]
Culbert Olson	Jan. 1941-Dec. 1942	19	3
Earl Warren	Jan. 1943-Sept. 1953	82	8
Goodwin Knight	Oct. 1953-Dec. 1958	41	6
Edmund G. Brown, Sr.	Jan. 1959-Dec. 1966	35	23
Ronald Reagan	Jan. 1967-Dec. 1974	1	1
Edmund G. Brown, Jr.	Jan. 1975-Dec. 1979	0	0
		178	41

It is obvious, then, that considerations of parole or commutation in the context of capital sentencing inevitably "frame . . .

[18] See William J. Bowers, "Executions in America" (1974), at pp. 226-231.

[19] The figures as to the number of commutations are based on information in the appendix to Governor Edmund G. Brown, Jr.'s 1979 *Executive Clemency Report to the Legislature.*

questions that no human mind can answer . . . The questions are unanswerable because they rest on future events which are unpredictable." *People* v. *Morse*, *supra*, 60 Cal.2d 631, 643 (1964). Any effort to account for these factors in imposing a death sentence necessarily injects a level of unpredictability and unreliability in the sentence phase of a capital case that cannot be tolerated. In the words of *Morse* a jury considering such factors "is precipitated into a judgment upon the imponderable." (*Id.*, at 644.)

Many state courts share the view that jury use of commutation or parole to sentence would be so speculative and uncertain as to be impossible to apply in any rational way. In striking down a statute which required a sentencing jury to be informed of the possibility of release on parole, the Tennessee Supreme Court noted that:

> "It is obviously impossible for any living being to compute, prior to verdict, how much time any prisoner will serve and yet this is precisely what trial juries are called upon to do. Otherwise there is no conceivable point to charging the jury as to these matters.
>
> "Jurors should not be permitted to speculate on the length of sentences, discretionary parole, the accumulation of good and honor time and a whole conglomeration of contingent events which, if they come to pass at all, will come to pass in the future. Very heavily involved is the constitutional right of a defendant to a fair trial.
>
> "This is trial by 'guess and by golly,' and we will not countenance it by upholding a statute which offends every sense of fairness and every precept of due process." *Farris* v. *State*, *supra*, 535 S.W.2d 608, 613-14 (Tenn. 1976).

An overwhelming number of state courts are in accord:[20]

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[20] (See, e.g., *Andrews* v. *State*, *supra*, 472 S.W.2d 86, 91-92 (Ark. 1971); *Sukle* v. *People*, *supra*, 111 P.2d 233, 235 (Colo. 1941); *Smith* v. *State*, *supra*, 317 A.2d 20, 25 (Del. 1974); *Broyles* v. *Commonwealth*, *supra*, 267 S.W.2d 73, 76 (Ky. 1954); *State* v. *Jones*, *supra*, 251 S.E.2d 425, 429 (N.C. 1979) ("[n]either the state nor the defend-

The Supreme Court of Louisiana recently recognized the constitutionally unacceptable level of arbitrariness engendered by a capital sentence jury speculating on future parole or commutation. In *State* v. *Lindsey*, *supra*, 404 So.2d 446, 487 (La. 1981), that court stated:

> "When a jury's attention is diverted from its primary responsibility of weighing the circumstances of the crime and the character and propensities of the offender and thrust into speculation about the future actions as of yet unknown actors, a serious possibility arises that each death sentence imposed under such conditions is the result of an interjection of an unquantifiable factor into the deliberation process, thereby rendering the decision arbitrary. In addition, the journey into this speculatory exercise necessarily raises the possibility that the jury will be motivated to act out of fear of the unknown possibility that the defendant might return to society, thereby compounding the risk of arbitrariness."

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ant should be allowed to speculate on the outcome of possible paroles, executive commutations or pardons . . ."); *Evans* v. *State*, *supra*, 541 P.2d 269, 272 (Okla.Cr.App. 1975); *State* v. *Leland*, *supra*, 227 P.2d 785, 796 (Ore. 1951) ("[t]he possibility of parole, purely speculative, should not enter into the jury's deliberations . . ."); *Commonwealth* v. *Johnson*, *supra*, 81 A.2d 569, 573 (Pa. 1951) ("[t]he duty of the jury in such cases is to determine the penalty without recourse to conjecture as to any possible or probable parole action of the Board of Pardons at some later time"); *State* v. *Atkinson*, *supra*, 172 S.E.2d 111, 112 (S.C. 1970) ("speculation"); *Jones* v. *Commonwealth*, *supra*, 72 S.E.2d 693, 697 (Va. 1952) ("Such a practice would permit punishments to be based on speculative elements, rather than on the relevant facts of the case, and would lead inevitably to unjust verdicts."); *State* v. *Carroll*, *supra*, 69 P.2d 542, 564 (Wyo. 1937).)

C. Considerations Of Commutation Deflect A Capital Sentencing Jury From Its Responsibility To Impose The Sentence Which Is Called For In Light Of The Character Of The Defendant And The Nature Of The Defendant's Offense, Thereby Undermining The Jury's Sense Of Responsibility

Just last term in *Enmund* v. *Florida*, *supra*, 73 L.Ed.2d at 1150 (emphasis in original), this Court held that in a capital case in which the death penalty is sought against a defendant charged along with others

> "The focus must be on *his* culpability, not on that of [the codefendants] . . . for we insist on 'individualized considerations as a constitutional requirement in imposing the death sentence,' [quoting from *Lockett* v. *Ohio*, *supra*, 438 U.S. at 605], which means that we must focus on 'relevant facets of the character and record of the individual offenders.' " (Quoting from *Woodson* v. *North Carolina*, *supra*, 428 U.S. at 304.)

See also, *Enmund*, *id.*, at 1170, (O'Connor, J., dissenting); *Lockett* v. *Ohio*, *supra*, 438 U.S. at 605 (1978) ("The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."); *(Stanislaus) Roberts* v. *Louisiana*, 428 U.S. 325 (1976); and *(Harry) Roberts* v. *Louisiana*, 431 U.S. 633 (1977).

As the Georgia and Illinois Supreme Courts have recently recognized: "[t]he ability or inability to obtain early release does not relate to a defendant's character, his prior record, or the circumstances of his offense." *Horton* v. *State*, 295 S.E.2d 281 (1982), (see also *People* v. *Walker*, ____ N.E. 2d ____ (Ill. 1982) (Doc. No. 52388)). Because the jury was free in this case to consider the fact of "early release" through commutation, it was necessarily deflected from its principal task, to accord the defendant "individualized consideration as a constitutional requirement in imposing a death sentence." *Lockett* v. *Ohio*, *supra*, 438 U.S. at 605. We have seen that the commutation power is essentially political, stemming ultimately from the power of the sovereign to dispense grace. (See *Schick* v. *Reed*,

supra, 419 U.S. at 266.) As such it can be and has been exercised on the basis of the executive's broad conception of the public good *irrespective* of the defendant or the facts of his crime. And even when the executive does account for the facts of an individual case, the commutation decision reflects *his* views of that case, not the jury's. The jury is given no guidance as to how the Governor implements these views.

The effect of a jury's efforts to account for commutation or parole is then, to deflect the jury away from its responsibility to sentence on the basis of the defendant and his crime and toward a consideration of the decision of the commuting or paroling authority—a decision incapable of examination because it has not yet been made and because the person or persons who will make it are as yet unknown.

This undermining of juror responsibility was precisely the California experience with juror consideration of parole and commutation issues in capital cases. That experience provided an important part of the historical background for the California Supreme Court's decision in this case. The author of the present opinion also wrote for the California Supreme Court in *People* v. *Morse*, *supra*, 60 Cal.2d 631. *Morse* recognized that the prior California practices of allowing juries to consider commutation and parole "has brought in its wake a trend of unremitting expansion in the scope of argument and evidence presented to the jury that has coincidentally produced and augurs future confusion." *Morse*, *supra*, 60 Cal.2d at 638. Under the pre-*Morse* practice, defense counsel would introduce evidence of the length of time a defendant sentenced to life would actually serve. Prosecutors would then introduce evidence of recidivists who had been "prematurely" released. Defense counsel would counter with evidence of the abilities and qualifications of the parole board (then the Adult Authority) and the Governor. Capital cases became trials within trials in which the inquiry was not whether the defendant before them deserved to live or to die, but whether the Governor and the California Adult Authority would perform their task. The *Morse* court concluded, that once the door had been opened to

permit juror consideration of future sentence modification, "various maneuvers have pushed the door so widely ajar that too many confusing elements have entered the courtroom." (60 Cal.2d at 639.) This level of confusion, the *Morse* court concluded, was unacceptable in a capital case because "the jury is precipitated into a judgment upon the imponderable" (60 Cal.2d at 644) and because the jury's sense of responsibility for its decision was thereby undermined.

This judgment of the California Supreme Court that juror consideration of commutation decisions deflects jurors from their proper inquiry of considering the facts of the case before them has been shared by many other jurisdictions. See, e.g., *Smith* v. *State*, *supra*, 317 A.2d 20, 25 (Del. 1974); *State* v. *Lindsey*, *supra*, 404 So.2d 466, 487 (La. 1981); *State* v. *White*, *supra*, 142 A.2d 65, 76 (N.J. 1958); *State* v. *Jones*, *supra*, 251 S.E.2d 425, 429 (N.C. 1979); *Commonwealth* v. *Johnson*, *supra*, 81 A.2d 569, 573 (Pa. 1951); *Farris* v. *State*, *supra*, 535 S.W.2d 608, 614 (Tenn. 1976); *Alejandro* v. *State*, *supra*, 493 S.W.2d 230, 231 (Tex. Cr. App. 1973); *Hinton* v. *Commonwealth* *supra*, 247 S.E.2d 704, 706 (Va. 1978). And California's view that the effect of this deflection of responsibility is to impel jurors to compensate for possible commutation by imposing a harsher sentence than would otherwise be called for is also shared by other jurisdictions.

In *Smith* v. *State*, *supra*, the Delaware Supreme Court noted that a jury "relying upon the possibility of parole, probation or the like . . . may be tempted to compensate for what it considers future leniency or release, and deal with the case more severely than it might otherwise." 317 A.2d at 25. See also *Alejandro* v. *State*, *supra*, 493 S.W.2d at 231. In the words of the New Jersey Supreme Court, "That death should be inflicted when a life sentence is appropriate is an abhorrent thought." *State* v. *White*, *supra*, 142 A.2d at 76. It is abhorrent because it contravenes our basic commitment to the notion of individualized criminal responsibility, a commitment which this Court has repeatedly made a constitutional imperative in capital cases.

In *People* v. *Walker*, *supra*, ___ N.E. 2d ___ (Ill. 1982) (Doc. No. 52388), Chief Justice Ryan writing for a unanimous Illinois Supreme Court stated:

> "The United States Supreme Court has held that in determining whether death is the appropriate punishment in a given case, the focus shall be upon the character and record of the offender, as well as the facts and circumstances surrounding his offense. (Citations omitted.) If, in considering the individual and the offense, the jury concludes that the defendant is not such a person as should be executed, then the fact that he may eventually be paroled by the executive branch of our State government does not mean that he should be executed to prevent that possibility. By injecting the parole consideration into the penalty determination, the jury is diverting its attention from the offense and the offender, and is focusing upon a speculative possibility that may or may not occur." (Slip Op. at p. 9.)

In *Beck* v. *Alabama*, *supra*, this Court decried the very vice which operates in the present commutation instruction. Like Alabama's removal of the "third option," the commutation instruction injects into the jury's deliberations an alien factor having nothing to do with the case on trial. And like the practice condemned in *Beck*, the consideration of that factor predisposes a jury to act without regard to whether such punishment is called for on the facts of the case before it. (447 U.S. at 642.)

Like the great majority of American jurisdictions,[21] California has reposed the power to commute sentences in its Chief Executive, a functionary of another branch of government. In our democracy that branch operates to serve political and social needs different from those served by the judiciary. When judicial decisions are made not on the basis of the facts of the case, but because of considerations entrusted to other branches of government, both the judicial system and the other branches suffer. Jurors do their job when they do their

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[21] See, Stafford, op cit. *supra*, at 1, 7-90.

duty, part of which is to assume that other duly constituted authority will do its duty. As the Supreme Court of Louisiana stated:

> "[A jury] must be informed that it is duty bound to disregard how other governmental bodies may, in their wisdom and subject to other contraints, act, but, instead, must concentrate upon whether it presently feels, in light of the character of the offender and the nature of the offense, the offender should be sentenced to death or to spend the remainder of his life in prison." *State* v. *Lindsey*, *supra*, 404 So.2d at 487.

See also, *Broyles* v. *Commonwealth*, *supra*, 267 S.W.2d 73, 75-76 (Ky. 1954); *Hinton* v. *Commonwealth*, *supra*, 247 S.E.2d 704, 706 (Va. 1978).

II

THE CALIFORNIA COMMUTATION INSTRUCTION MISLEADS THE JURY BY SELECTIVELY INFORMING THEM OF THE GOVERNOR'S POWER TO COMMUTE ONE OF THEIR SENTENCING CHOICES BUT NOT THE OTHER

In addition to the vices already discussed, the jury instruction at issue here is constitutionally defective because it creates a misleading impression of the nature of commutation, and therefore leaves the jury fundamentally misled about the consequences of its sentencing decision. In creating this misleading impression, the instruction has "crossed the line of neutrality" (*Adams* v. *Texas*, 448 U.S. 38, 44 (1980)) and cast the state in the role of unfairly engineering verdicts of death.

We have already seen how this Court has repeatedly insisted on the special need for reliability in capital cases. Indeed, the court has "gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake." *Eddings* v. *Oklahoma*, ____ U.S. ____, 71 L.Ed.2d 1, 13 (1982) (concurring opinion). See also *Gardner*, *supra*, 430 U.S. 349; *Beck*, *supra*, 447 U.S. 625; *Woodson*, *supra*, 428 U.S. 280, at 305.

A decision based on mistake is not only unreliable, it is arbitrary and capricious, and undermines the entire purpose of guided discretion: to provide a meaningful basis for distinguishing between the few who are sentenced to death and the many who are not sentenced to death. *Furman* v. *Georgia*, *supra*, 408 U.S. at 313 (White, J.). The information disclosed by the Briggs Instruction is fundamentally misleading, and is calculated to leave the jurors with a mistaken impression.

The commutation instruction at issue here must be understood in the context of the larger purpose of the Briggs Initiative to secure more death verdicts more easily. This instruction is one of many procedural devices in the Initiative designed to accomplish this end.[22] What is unique about the Instruction, however, is that it seeks to obtain death verdicts by selectively dispensing information to the jurors and thereby deceiving them. The provision thus represents an abuse of legislative authority which the Constitution cannot countenance.

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[22] The Initiative was presented to California voters by its proponents as "the nation's toughest, most effective death penalty law" which would replace the previous "weak and ineffective death penalty law" which did "not apply to every murderer. Proposition 7 would." (Ballot Argument, pp. 34-35.) To accomplish this objective the Initiative greatly expanded the *number* of special circumstances which could lead to a death verdict; greatly expanded the *scope* of the special circumstances, eliminating the requirement that certain murders be premeditated, wilful, and deliberate (compare former 190.2 subd. (c)(3) with present 190.2 subd. (a)(17); eliminated the need for personal presence at the scene in most murders; expanded the definition of aiding and abetting; made proof of many of the special circumstances easier; and increased the number of times a defendant could be retried after a hung jury. As to the general purpose of the Initiative, see *In re Jeanice D.*, 28 Cal.3d 210, 226-28 (1980) (Richardson, J., dissenting).

While making sure the jurors are aware of the Governor's power to reduce one of the jury's two sentencing choices, the instruction fails to advise them that he may also commute the other of their choices. This selectively dispensed information inevitably leaves the jurors with the impression that only one of their two choices is potentially infirm and subject to modification. Addressed as the Instruction is to jurors who have found the defendant guilty of serious crimes, and who may well be seeking some assurance the sentence they impose will not be modified, it is an especially potent and misleading engine for obtaining a verdict of death. The effect of the instruction, is to mislead the jury "by implying that if they find the defendant unfit ever to return to society, they can prevent the Governor from commuting the sentence by condemning the defendant to death." *People* v. *Haskett*, 30 Cal.3d 841, 861 (1982).

This impression is of course not true. The power of commutation in California extends to death as well as to life without parole sentences. *(In re Collie, supra.)* And in fact it has been exercised many more times in death sentences over the years than in life without parole sentences. (There have been 24 commutations from life without parole to life with parole and 41 commutations of death sentences either directly to life or to life without parole.) (1979 *Executive Clemency Report, supra*) The implication of the instruction, therefore, that life without parole does not mean life without parole, but that death may mean death is therefore not accurate.

This impression is created by a kind of partial disclosure which, as the California Supreme Court recognized, would create a basis for a cause of action for fraudulent misrepresentation under California Civil Code section 1710, subd. 3, in a simple contract dispute. That is, although the instruction is true as far as it goes, it is the law in California that "a representation literally true is actionable if used to create an impression substantially false." (*Sullivan* v. *Helbing*, 66 Cal.App.2d 286, 289 (1942).) To uphold the instruction in this context, "would

authorize state-sanctioned fraud and deceit in the most serious of all state actions: the taking of a human life." (*People* v. *Ramos*, A-116, A-21; 30 Cal.3d at 597, n.21.)

Petitioner argues that since life without parole does not mean the defendant can never be paroled "it is reasonable to conclude that informing the jury a sentence of life imprisonment without the possibility of parole *may* in future be modified so as to include the possibility of parole removes a distorting factor which might otherwise be present." (Brief on Merits, p. 48, emphasis in original.) The argument proves too much. For if it is true that it is a distortion to leave jurors with the uncorrected notion that life without parole does mean life without parole, then why is not still distorting not to disabuse them of the idea that death means death? And having disabused them of one distortion, is it not also misleading not to correct the other? Clearly, the selective thrust of the instruction is to drive the jurors toward death, and to accomplish this by means of deceit. In using this distorting technique the state has in this instance "crossed the line of neutrality" *(Adams* v. *Texas, supra)* and created a jury uncommonly and unfairly willing to execute the defendant.

This Court has made clear that sentences based on distorted perceptions of either the factual record or the legal significance of the record cannot be squared with the constitution. See, e.g., *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972).) In *Tucker* this Court set aside a sentence when the trial judge had acted "upon misinformation of constitutional magnitude" *(ibid.)*. Both *Burke* and *Tucker* were noncapital cases in which a judge was misled. Surely it must follow where misleading or incomplete information is presented to laymen in a capital case the death sentence that results cannot stand.

Petitioner's reliance on *People* v. *Morse*, *supra*, in support of his argument that it is impermissible to inform the jury of the power to commute a life without parole sentence is difficult to understand. (Brief on Merits, pp. 54-58.)

For petitioner's use of *Morse* overlooks the crucial fact that under the jury instruction approved in that case the jury was explicitly to be told that " '. . . the matter of parole is not to be considered by you in determining the punishment for this defendant and you may not speculate as to if, or when, parole would or would not be granted to him. . . . *It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Adult Authority will properly carry out its responsibilities [with regard to parole].*" 60 Cal.2d at 648. (Emphasis added.)

There is no comparable limiting instruction under the Briggs Initiative, and as we have seen the California Supreme Court has authoritatively construed the statute to place possible commutation of a life without parole sentence before the jury for its consideration. It is simply inaccurate to say that *Morse* found it "proper to instruct the jury regarding parole" (Petitioner's Brief on the Merits, p. 55).

Petitioner also misses the point when he argues that *in the abstract* an instruction on the Governor's power to commute a death sentence would not be requested by the defendant. For the question is not presented in the abstract in this case. The question here is whether giving the jury the life without parole commutation instruction without the accompanying context of a death commutation instruction leaves the jury misled to the defendant's prejudice.

Respondent agrees and has argued that *any* instruction which permits the jury to consider the Governor's commutation power inevitably and unfairly prejudices the defendant. If that argument is accepted, the statute falls without regard to its partial disclosure. The present argument that the statute is defective because it authorizes only partial disclosure *assumes arguendo* the propriety of commutation considerations. If, as petitioner argues, commutation is a factor properly to be con-

sidered by the jury, then basic principles of fairness require that full disclosure be made with respect to commutation.[25]

III
THE CALIFORNIA SUPREME COURT'S CONCLUSION THAT THE ERROR WAS PREJUDICIAL IS AMPLY SUPPORTED IN THE RECORD, WAS CORRECT, AND SHOULD NOT BE DISTURBED

Part III of Petitioner's Brief appears to be a summation of previous contentions combined with an apparent harmless error argument. Since the other points have already been dealt with, we here briefly meet the contention that the instruction did not affect the death sentence returned against Mr. Ramos.

The California Supreme Court has considered this question and has concluded otherwise. Since the conclusion is amply borne out by the record, and was entirely correct, there is no cause to disturb it here.

This was not a case in which death was in any sense compelled or inevitable, even assuming there can be such a case. As petitioner himself concedes (Brief on Merits, p. 60), there was considerable evidence in mitigation at the penalty phase of the case. The defendant had never been arrested before. He had been orphaned in his early teen years. Prior to the death of his mother when he was 13, respondent had been a well-behaved, church-going boy who remained out of trouble. When his

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[25] Petitioner also seeks to argue from defense counsel's failure to request a death commutation instruction, but it is not entirely clear what point is being made. Counsel objected to the giving of the instruction as written before and during the penalty phase. The statute on its face does not authorize the giving of a death commutation instruction and it was not the intent of the drafters of the statute to put death commutation before the jurors. Most important, the California Supreme Court did not treat counsel's objection as in any way inadequate, incomplete, or improper. (See *Warden* v. *Hayden*, 387 U.S. 294, 297, n.3 (1967).)

mother died 5 years after the death of his father respondent's life changed. He was forced to live alone with his teenage brother who was simply unable to provide respondent with the structured, loving atmosphere he needed. Respondent's plight was complicated by the fact that he was mentally impaired, suffered brain damage and had an IQ of about 75. His low intelligence and his low self-esteem made him easily susceptible to unwholesome influences. Principal among those influences was respondent's crime partner, Ruben Gaitan, who dominated respondent and filled him with grandiose and often illegal ideas. The jury was also aware of the fact that Gaitan would not receive the death penalty. Clearly, this jury could have voted to spare respondent's life.

In attempting to minimize the impact of the issue of commutation petitioner, curiously, relies on evidence which the California Supreme Court has ruled was improperly admitted *as a matter of state law*, and which was injected into the penalty phase because commutation was a factor in the case. Thus, petitioner notes that "[t]he fact that respondent was aware of the possibility of parole and had indicated to the defense psychiatrist months after the offense, that if released he might seek revenge on other persons was highly relevant in assessing the psychiatrist's opinions as to the dynamics of the offense and respondent's character." (Brief on Merits, p. 64.) This argument is made in the teeth of the California Supreme Court's ruling under California Evidence Code section 352 that the testimony was erroneously admitted.

In addition, the commutation instruction was urged on the jury by the prosecutor, was read in full to the jury by him, and was the subject of an extensive colloquy by defense counsel in which he was forced to make the very argument which *Morse* and numerous other cases have sought to avoid: that the Governor and the Parole Board would do their jobs (JA-29-31). Thus a future as yet unelected California Governor and the California prison system itself became factors to reckon with at trial. To the extent their performances were accounted for by the jury, the verdict of death was based on imponderable,

unknowable, arbitrary and capricious factors totally divorced from Marcelino Ramos or his crime.[24] This Court cannot vindicate the constitutional imperative for a "greater degree of reliability when the death sentence is imposed" *Lockett* v. *Ohio*, *supra*, 438 U.S. at 604 and uphold a sentence in which future commutation was a factor.

The California Supreme Court's conclusion that the error in this case was prejudicial is completely supported by the record and should not be disturbed.

IV

CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED, OR THE MATTER SHOULD BE REMANDED TO THE CALIFORNIA SUPREME COURT FOR A DETERMINATION OF THE ADEQUACY OF THE STATE LAW ISSUE RESOLVED AT FOOTNOTE 22 OF THE CALIFORNIA SUPREME COURT OPINION

A serious obstacle exists to exercise of this Court's *certiorari* jurisdiction, making it inappropriate for the Court to reach the merits of the federal claims petitioner tenders. At footnote 22 of its opinion in this case, the California Supreme Court held

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[24] Petitioner's suggestion (Brief on Merits, p. 65) that defense counsel argued commutation out of some independent tactical motive is based on the sheerest speculation. Counsel repeatedly objected to the giving of any instruction on commutation or to the introduction of commutation on prosecution cross-examination. There is no basis for hypothesizing that he would have argued the issue if he had not been forced to do so. As this Court stated in another context in *Harrison* v. *United States*, 392 U.S. 219, 223 (1968)) " 'The springs of conduct are subtle and varied,' Mr. Justice Cardozo once observed [in *DeCicco* v. *Schweizer*, 221 N.Y. 431, 438, 117 N.E. 807, 810 (1917)]. 'One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.' " Having released the spring by injecting commutation into the case the Government must show that its action did not induce counsel's argument.

that the trial judge acted improperly under California Evidence Code section 352 in permitting testimony as to the defendant's possible feelings of revenge toward participants in the trial, including the jurors. (App. to Cert. Petition, A-120, n.22; 30 Cal.3d 553, 558 n.22.) Because that holding constitutes a ruling that there exists an error of state law in this case, and because if called on to do so, the California Supreme Court would almost certainly deem that error to be prejudicial without regard to the federal questions, this Court should stay its hand on the merits of those federal questions. Instead, the Court should either dismiss the writ of *certiorari* as improvidently granted or vacate the judgment and remand to the California Supreme Court to obtain its views on the adequacy of the state ground to support the judgment.

This Court has long recognized that:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but *that its decision of the federal question was necessary to the determination of the cause*, and that it was actually decided or that the judgment could not have been given without deciding it. . . ."

Lynch v. *New York ex rel. Pierson*, 293 U.S. 52, 54 (1934) (emphasis added). See also *Paschall* v. *Christie-Stewart, Inc.*, 414 U.S. 100, 101-02 (1973); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-28 (1945); *Phyle* v. *Duffy*, 334 U.S. 431, 444 (1948). The rule requiring a showing that the decision rests on a federal ground necessary to the decision "is a consequence of the Court's obligation to refrain from rendering advisory opinions or passing on moot questions." *Fay* v. *Noia*, 372 U.S. 391, 430 (1963). As explicated more fully by Justice Jackson in *Herb* v. *Pitcairn*, *supra*, 324 U.S. at 125-26:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate or independent state grounds [citations omitted]. The reason is so obvious that it has rarely been thought to warrant statement. It is found in

> the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Litigants seeking to invoke this Court's *certiorari* or appeal jurisdiction in a case arising in a state court have the burden of showing that there exists no nonfederal ground which either was or could have been dispositive of the cause below. (See, e.g., *Philadelphia Newspapers, Inc.* v. *Jerome*, 434 U.S. 241, 245 (1978) (Rehnquist, J., dissenting); *Paschall* v. *Christie-Stewart, Inc.*, *supra*, 414 U.S. at 101-02.) Where the record below is ambiguous as to the existence or adequacy of the state ground this Court has consistently declined to assert jurisdiction. Instead, the Court has either dismissed the petition as having been improvidently granted (*Phyle* v. *Duffy*, *supra*, 334 U.S. at 441; *Lynch* v. *New York ex rel. Pierson*, *supra*, 293 U.S. at 55); or has vacated the state court judgment and remanded with directions to determine the existence or the adequacy of the state ground. (*Paschall* v. *Christie-Stewart, Inc.*, *supra*, 414 U.S. at 102; *California* v. *Krivda*, 409 U.S. 33 (1972); *Department of Mental Hygiene of California* v. *Kirchner*, 380 U.S. 194, 200 (1964).)[25] Both dispositions recognize that this Court "cannot perform [its] duty to refrain from interfering in state law questons and also to review federal

---

[25] A third option of continuing the matter on this Court's calendar to permit petitioner to obtain a certificate from the state court as to the basis for its decision, utilized in *Herb* v. *Pitcairn*, *supra*, 324 U.S. at 128, is not available here because the California Supreme Court considers itself without jurisdiction to issue such a certificate under those circumstances. See *Dixon* v. *Duffy*, 344 U.S. 143 (1952).

ones without making a determination whether the one or other controls the judgment." (*Herb* v. *Pitcairn*, *supra*, 324 U.S. at 127.)

The state of this record here makes one of these two dispositions appropriate. The California Supreme Court has clearly ruled that the trial judge abused his discretion under California Evidence Code section 352 by overruling defendant's objection and admitting certain testimony of Dr. Sheffner. (Appendices to Certiorari Petition, A-120, n.22; 30 Cal.3d 553, 558, n.22) The California Supreme Court stated:

> "A trial court ruling admitting evidence under section 352 may be reviewed only to determine whether the court abused its discretion. (See *People* v. *Kelley* (1977) 75 Cal.App.3d 672, 678.) *Although courts have rarely found an abuse of discretion, our opinion is that the present case constitutes one of those rare exceptions.*" (Emphasis added.)

Because the California Supreme Court purported to base its decision on the federal question, it did not explicitly pass on whether, apart from any federal error, the error of state law would compel reversal of the death sentence. Where, as here, the state court has actually passed on a state law question and has concluded that an error of state law has been committed, but has simply not assessed the prejudicial nature of the error, the jurisdiction of this Court is not secure. This is especially so where, given the nature of the error of state law, it is reasonably certain that the California Supreme Court would, if required to consider the question, find the error sufficiently grave to warrant reversal of the death judgment. In no meaningful sense can it be said in such a situation that the resolution of the federal question was *necessary* to the judgment.

The erroneously admitted evidence in this case consisted of testimony concerning the defendant's alleged future vengeful feelings toward the judge who presided at the case, the prosecutor who tried it, and even the jurors who heard it. (See RT 1054-56.) It is difficult to imagine how it can be anything but

prejudicial for the jurors in the penalty phase of a capital case to receive erroneously admitted testimony that the defendant may seek to avenge himself on them. This is especially true in California, where the rule is that any "substantial error" in the penalty phase of a capital case requires reversal. *People* v. *Hines*, 61 Cal.2d 164, 169 (1964); *People* v. *Terry*, 61 Cal.2d 137, 153-54 (1964); *People* v. *White*, 69 Cal.2d 751, 763 (1968); *People* v. *Hamilton*, 60 Cal.2d 105, 136-37 (1963). At the least, the question of whether resolution of the federal question was necessary to the judgment is sufficiently close that this Court cannot proceed.

This case comes within none of the limited exceptions that would permit this Court to reach the federal question. This is not a case where the state court construed its own law as it did because it felt compelled to do so by federal constitional considerations (*cf. Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979)), or where the state and federal issues were so "interwoven" that a ruling on one necessitated a ruling on the other, (*cf. Enterprise Irrigation District* v. *Farmer's Mutual Canal Co.*, 243 U.S. 157, 164 (1917)), or where a lurking state law issue was not raised or passed on below (*cf. Orr* v. *Orr*, 440 U.S. 268, 276-77 (1979)).

Here the state law issue was raised and decided and the holding on that issue was based on a section of the law of California evidence having no root in the United States Constitution. And while the *prejudicial impact* of the error under California Evidence Code section 352 was measured by the California Supreme Court in part in terms of the federal error, that Court's ruling that the error *existed* was made wholly without reference to federal law.

In *Paschall* v. *Christie-Stewart, Inc.*, *supra*, 414 U.S. 100, 101-02, this Court vacated and remanded to the Oklahoma Supreme Court for resolution of an unresolved and unraised state statute of limitations question which might have disposed of the case without the need to address the federal question. This case is far clearer than *Paschall* and follows *a fortiori* from

it. Here not only was the state law question raised, and argued, it was actually *passed on* by the California Supreme Court. As this Court said only last term in *Mills* v. *Rogers*, ___ U.S. ___, 73 L.Ed.2d 16, 27 (1982): "It is this Court's settled policy to avoid unnecessary decisions of constitutional issues." In order to effectuate that policy in this case this Court should either dismiss the writ as having been improvidently granted or should vacate the judgment of the California Supreme Court and remand with directions to resolve whether the state law error under California Evidence Code section 352 would, independent of any possible federal error, require reversal of the death judgment.

CONCLUSION

For the foregoing reasons the judgment of the California Supreme Court should be affirmed or *certiorari* should be dismissed as improvidently granted or the judgment should be vacated and the matter should be remanded to the California Supreme Court so it can determine the adequacy of the independent state ground contained in footnote 22 of that Court's opinion.

Respectfully submitted,

Ezra Hendon
EZRA HENDON
Deputy State Public Defender
(Court-appointed Attorney for Respondent)

Supplemental Respondent's Brief

To be argued Feb. 22

No. 81-1893

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RECEIVED
FEB 1 : 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CALIFORNIA, Petitioner,

v.

MARCELINO RAMOS, Respondent.

On Writ of Certiorari To The
Supreme Court of California

RESPONDENT'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 35.5

EZRA HENDON
Deputy State Public Defender
1390 Market Street, Suite 425
San Francisco, California 94102
Telephone: (415) 557-1600

(Court-Appointed Attorney
for Respondent)

No. 81-1893

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CALIFORNIA, Petitioner,

v.

MARCELINO RAMOS, Respondent.

On Writ of Certiorari To The
Supreme Court of California

RESPONDENT'S SUPPLEMENTAL BRIEF
PURSUANT TO RULE 35.5

Pursuant to Rule 35.5 of this Court, respondent submits the following authorities which were either not decided or not officially reported at the time the Brief for Respondent was submitted for printing.

1. At page 13, n. 4 of the Brief for Respondent cases were cited in which state courts had disapproved of allowing juries to be advised of, or to rely on, the power of commutation or parole. The following additional cases also so hold and should be added on that point:

Maryland: Poole v. Maryland, ___ A.2d ___ (January 7, 1983), Slip Op. at pp. 32-35.

North Carolina: State v. Brown, 293 S.E.2d 569, 588-89 (1982).

The addition of Poole brings to 24 the states which do not permit a sentencing jury to consider parole, pardon, and commutation in imposing sentence.

2. The Illinois Supreme Court opinion in People v. Walker, cited at pp. 13, 14, 27, and 30 of the Brief for Respondent has been reported at 440 N.E.2d 83 (Ill. 1982).

3. At page 32 and n. 22 of the Brief for Respondent the point was made that the purpose of the Briggs Initiative was to "expand the scope of capital punishment." The following language in the opinion of the California Supreme Court in People v. Spears, ___ Cal.3d ___ (Crim. 22083), (January 20, 1983), Slip Op. at page 4, confirms this point. "We do not doubt that the purpose of the [Briggs] initiative was to 'toughen' the existing punishment for murder in several respects: e.g., it increased the severity of the sentence for second degree murder and for first degree murder when the penalty imposed is life imprisonment with possibility of parole (§ 190), and it expanded both the number of 'special circumstances' that will support the penalty of death or life imprisonment without possibility of parole (§ 190.2 subd. (a)) and the category of persons derivatively subject to such penalties (id., subd. (b))."

DATED: February 10, 1983.

Respectfully submitted,

Ezra Hendon

EZRA HENDON
Deputy State Public Defender

Court-Appointed Attorney for Respondent

EH:sms

Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
FEB 15 1983
ALEXANDER L. STEVAS,
CLERK

NO. 81-1893

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

REPLY BRIEF

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
DANIEL J. KREMER,
Chief Assistant Attorney
General--Criminal Division
JAY M. BLOOM,
Deputy Attorney General
HARLEY D. MAYFIELD,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7759

Attorneys for Petitioner

PETITION FOR CERTIORARI FILED APRIL 13, 1982
CERTIORARI GRANTED OCTOBER 4, 1982

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NO. 81-1893

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

REPLY BRIEF

ARGUMENT

I

INSTRUCTING THE JURY AT THE PENALTY PHASE OF A CAPITAL CASE AS TO THE INDISPUTABLE FACT THAT THE PRESCRIBED ALTERNATIVE SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE MAY IN FUTURE BE MODIFIED TO INCLUDE THE POSSIBILITY OF PAROLE DOES NOT DENY DUE PROCESS

This brief will address specific points raised in the respondent's brief.

The failure to address other specific points in the respondent's brief in no way concedes their validity, and petitioner stands by the argument presented in petitioner's brief on the merits.

A. The State Cases Cited By Respondent Are Not In Point, and Are Neither Binding nor Persuasive

The instruction at issue in this proceeding (1) is required by state statute; (2) accurately informs the jury of the legal consequence of the alternative sentence of life without the possibility of parole; (3) is rendered only after the jury has found beyond a reasonable doubt that the defendant is guilty of murder of the first degree, and that a special aggravating circumstance is true; and (4) is accompanied by instructions which set forth specific aggravating and mitigating circumstances, require the jury to weigh aggravating and mitigating circumstances

and permit imposition of the death penalty only if the jury finds aggravating circumstances outweigh mitigating circumstances. None of the cases cited by respondent at pages 13-17 of the respondent's brief on the merits are in point.

None of the cases cited in support of respondent's position involve a validly enacted state statute.[1/] None address the question whether it is appropriate or permissible to explain the legal consequences of the alternative sentence in a death penalty case when the legal description of that sentence is otherwise misleading.

---

1. Farris v. State (Tenn. 1976) 535 S.W.2d 608, involved a state statute. However, in that non-capital case the Tennessee Supreme Court held that the portion of the statute which required jury instructions on parole was both void because not validly enacted and impermissibly vague. (Id., at pp. 610-613.)

Cases in which both guilt and punishment are determined in the same proceeding are clearly distinguishable, as are non-capital cases in which the jury may choose from a range of punishments. Obviously distinguishable are older cases in which the death penalty was imposed in the jury's absolute discretion, and any case where the jury is not given specific aggravating and mitigating circumstances to consider and instructed to return a death penalty only if they find aggravating circumstances outweigh mitigating circumstances. Of course cases in which the prosecutor urges the jury to base its decision on parole expectations is of no application.

Even assuming the California statutory procedure would not be favored or approved by other states, that does not establish its unconstitutionality. The fact that a practice is followed by

a large number of states is plainly worth considering in determining whether it violates due process. (Leland v. Oregon (1952) 343 U.S. 790, 798.) However, a state procedure does not run foul of the Fourteenth Amendment because another method may seem to be fairer or wiser. (Id., at p. 799; Snyder v. Massachusetts (1934) 291 U.S. 97, 105.)

The California statute adopted in light of its own unique procedures does not violate due process because it does not follow the procedures of other states.

B. The Findings of the California Supreme Court are not Binding On This Court

Respondent contends that the California Supreme Court has authoritatively construed the California statute to put the issue of gubernatorial commutation before the jury for its consideration, and that construction is

binding on this Court. (Respondent's Brief, pp. 19-22.) Not so.

The statutory provision is so plain as to require no construction. What the California Supreme Court construed was the effect of the instruction required by the statute. Furthermore, that finding was not the result of an evidentiary hearing, but merely the California Supreme Court's view of the jury's interpretation of the instruction and its likely effect. In fact, there is no evidence at all that the instruction had any effect on the jury in this case, or that death penalties have been imposed more frequently in cases in which the instruction was given than in cases in which it was not.

Furthermore, even had the California Supreme Court's interpretation involved a finding of fact it would not be dispositive. State courts cannot avoid

review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. (Williams v. North Carolina (1945) 325 U.S. 226, 236.) And state courts may not preclude this Court from its responsibility to examine the evidence to see whether it furnishes a rational basis for the characterization put on it. (Wood v. Georgia (1962) 370 U.S. 375, 386.) Whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former it is incumbent upon this Court to analyze the facts. (Norris v. Alabama (1935) 294 U.S. 587, 590.) Although the Supreme Court of California was the final authority on the construction of the statute itself under California law, it is not the final authority on the interpretation which a jury

could have given the instruction. (See Sandstrom v. Montana (1979) 442 U.S. 510, 516-517.)

The instructions given by the trial court in this case are indisputable matters of record. Therefore, the questions whether the instructions told the jury to consider commutation or parole in rendering its penalty decision and whether respondent's federal due process rights were denied are questions for this Court.

II

RESPONDENT'S CONTENTION THAT CERTIORARI SHOULD BE DISMISSED OR THE MATTER REMANDED FOR DETERMINATION OF ADEQUACY OF STATE GROUNDS IS NEITHER TIMELY PRESENTED NOR MERITORIOUS

For the first time, respondent contends in his brief on the merits that certiorari should be dismissed as improperly granted because a footnote in

the opinion of the California Supreme Court held it was error to admit evidence that respondent had told the defense psychiatrist he was aware of the possibility of parole, and indicated possible feelings of revenge toward participants in the trial. (Respondent's Brief, pp. 38-43.) Respondent could have presented that contention in his brief in opposition to the petition for certiorari. (Supreme Court Rules, rule 22.3.) He did not do so, and it is therefore not necessary to consider that contention on the merits. (See Wiener v. United States (1958) 357 U.S. 349, 351, n.) In any event, the contention lacks merit.

In its opinion in this case the California Supreme Court stated positively and unequivocably that its judgment reversing the sentence of death was rendered on the basis of the federal

constitutional issue presented in this proceeding.

Near the beginning of its opinion the California Supreme Court held:

> "[W]e have concluded that several recent United States Supreme Court cases mandate our holding unconstitutional on due process grounds the portion of the 1978 statute which requires the penalty phase jury to be instructed regarding the Governor's power to commute a sentence of life imprisonment without the possibility of parole. Accordingly, the judgment of death must be reversed due to the use of this unconstitutional 'Briggs Instruction.'" (People v. Ramos (1982) 30 Cal.3d 553, 562-563; Appen. A to Pet. for Cert., pp. 3-4.)

The entire text of the court's discussion of error at sentencing was devoted to the statutorily required instruction. (30 Cal.3d at pp. 590-602; Appen. A to Pet. for Cert., pp. 95-132.)

Respondent now asserts, however, that footnote 22 of the California Supreme

Court's opinion sets forth an independent and adequate state ground for reversal, depriving this Court of jurisdiction. In that footnote the court held that the defense psychiatrist's testimony regarding appellant's knowledge of the possibility of parole and contemplation of taking revenge if he were to be released was relevant, but held that the evidence was prejudicial "particularly when considered in connection with the jury instruction on the Governor's commutation power." (People v. Ramos, supra, 30 Cal.3d at p. 598, n. 22; Appen. A to Pet. for Cert., pp. 119-120.) In the text preceding the footnote the court had held in part that: "the instruction also encouraged the prosecutor to elicit some particularly prejudicial testimony on cross-examination from Dr. Sheffner, the defense psychiatrist." (Id., at p. 597; Appen. A to Pet. for Cert., p. 118.) In the footnote the court

concluded that the evidence should not be admitted if the penalty phase was retried, but did not hold that admission of the evidence was itself reversible error.

It is clear from the reasoning of the California Supreme Court that the reason it found this evidence prejudicial was because of the instruction. Furthermore, a necessary predicate to the court's determination is the view that it is constitutionally impermissible for the sentencing jury to consider a defendant's future conduct in making its penalty determination. That question is inextricably entwined with the question presented in this proceeding, and was decided to the contrary by this Court in Jurek v. Texas (1976) 428 U.S. 262, 269, 274-277.

If the California Supreme Court had held that admission of evidence was

prejudicial error on purely state grounds, and had anchored its judgment in this case on that basis, an independent and adequate state ground might exist and this Court would be without power to hear the constitutional argument. (See Orr v. Orr (1979) 440 U.S. 268, 275-276; Herb v. Pitcairn (1945) 324 U.S. 117, 125-126.) And if there were ambiguities as to whether the state's decision was based on federal or state grounds, it would be open for this Court not to determine the federal question, but to remand to the state court for a clarification as to the ground of the decision. (Orr v. Orr, supra, at p. 276.) However, the court is not at liberty to disregard the explicit holding of the state court as to the basis of its decision except for convincing reasons. (Guaranty Trust Co. v. Blodgett (1933) 287 U.S. 109, 512.)

The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question. (United Air Lines v. Mahin (1973) 410 U.S. 623, 630-631; see Orr v. Orr, supra, 440 U.S. at pp. 276-277.)

In Delaware v. Prouse (1979) 440 U.S. 648, the Delaware Supreme Court held that a vehicle stop violated not only the federal constitution but the constitution of Delaware. This Court rejected the contention that it had no jurisdiction because the judgment was based on an independent and adequate state ground, and rejected the suggestion that the matter should be remanded for clarification as to the ground upon which the judgment rested. (Id., at pp. 651-652.) This Court held:

> "Based on our reading of the opinion, however, we are satisfied that even if the State Constitution would have provided an adequate basis for the judgment, the Delaware Supreme Court did not intend to rest its decision independently on the State Constitution and that we have jurisdiction of this case." (Delaware v. Prouse, supra, 440 U.S. at p. 652.)

In this case there is no ambiguity and no possible doubt that the judgment of the California Supreme Court reversing the death penalty was based exclusively and solely on federal constitutional grounds. There is therefore no question as to this Court's jurisdiction. (Delaware v. Prouse, supra, at p. 653; Zacchini v. Scripps-Howard Broadcasting Co. (1977) 433 U.S. 562, 568.) Furthermore, even the California Supreme Court's reference to Evidence Code section 352 indicates that the California Supreme Court "felt

compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." (Zacchini v. Scripps-Howard Broadcasting Co., supra, 433 U.S. at p. 568.) It is therefore clear that this Court properly has jurisdiction over the federal claim presented. (Delaware v. Prouse, supra, 440 U.S. at p. 653.)

* * * * *

CONCLUSION

For all the reasons set forth in petitioner's brief on the merits and in this brief, we respectfully submit the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of
the State of California

DANIEL J. KREMER, Chief
Assistant Attorney
General--Criminal
Division

JAY M. BLOOM,
Deputy Attorney General



HARLEY D. MAYFIELD
Deputy Attorney General

Attorneys for Petitioner

HDM:kl
82US0003
2-1-83

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California
HARLEY D. MAYFIELD,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

MARCELINO RAMOS,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within REPLY BRIEF as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee names as follows:

Ezra Hendon
Deputy State Public Defender
1390 Market Street, Ste. 425
San Francisco, California 94102

Court of Appeal
Fourth Appellate District
Division Two
303 West Third Street,
Room 640
San Bernardino, CA 92401

Cecil Hicks, District Attorney
Orange County
P. O. Box 808
Santa Ana, CA 92702

California Supreme Court
350 McAllister Street
Room 4050
San Francisco, CA 94102

Lee A. Branch, Clerk
Orange County
P. O. Box 838
Santa Ana, CA 92702

FOR DELIVERY TO:
Hon. R. J. Beacom, Judge

Each envelope was then sealed and with the postage prepaid, deposited in the United States mail by me at San Diego, California on the 2 day of February, 1983. There is delivery service by United States Mail at each place addressed above, and regular communication by United States Mail between the place of mailing and each place addressed above.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 3 Day of February, 1983
San Diego, California

CLIFFORD E. REED, JR.

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

Subscribed and sworn to before me this 3rd day of February, 1983.

Notary Public in and for said County and State

KAREN K. [illegible]
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SAN DIEGO
My Commission expires Feb. 03, 1984

Docket Sheet

NO. 81-1893-CSY	TITLE California, Petitioner v. Marcelino Ramos

DOCKETED	COURT
Apr. 13, 1982	Supreme Court of California

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Harley D. Mayfield
	Counsel for Respondent: Alan M. Caplan
Mar. 4, 1982	Application for stay filed.
Mar. 8, 1982	Response requested - due 3/15/82.
Mar. 12, 1982	Response filed.
Mar. 15, 1982	Referred to the Court - conference 3/19/82.
Mar. 22, 1982	Denied by order of the Court.
Apr. 13, 1982	Petition for writ of certiorari filed. (Record filed).
Apr. 13, 1982	Appendix filed.
May 18, 1982	DISTRIBUTED. 6-3.(Stricken)
June 2, 1982	Response requested.
June 30, 1982	Motion of respondent for leave to proceed in forma pauperis and brief in opposition filed.
July 7, 1982	DISTRIBUTED. SL7P1.
Oct. 4, 1982	The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

Oct. 12, 1982	Motion of respondent for appointment of counsel filed.
Oct. 12, 1982	Application for stay filed.
Oct. 13, 1982	Response requested by Rehnquist, J., Due noon 10/25/82 at noon.
Oct. 25, 1982	DISTRIBUTED. 10-29. (Motion of respondent for appointmer of counsel).
Oct. 25, 1982	Response to application for stay filed.
Oct. 26, 1982	Order granting same by Rehnquist, J., with memo opinion.
Nov. 1, 1982	The motion for appointment of counsel is GRANTED and it is ordered that Ezra Hendon, Esquite, of San Francisco, California, is appointed to servie as counsel for the respondent in this case.
Nov. 12, 1982	Joint appendix filed.
Nov. 17, 1982	Brief for the petitioner filed.
Dec. 18, 1982	Brief for respondent filed.
Jan. 14, 1983	CIRCULATED.
Feb. 5, 1983	Reply brief for the petitioner filed, (D).
Feb. 14, 1983	Respondent's supplemental brief filed. (NP).(D).
Feb. 22, 1983	ARGUED.